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Notes

Kansas v. Hendricks: Absent a Clear Meaning of Punishment, States Are Permitted to Violate Double Jeopardy Clause

*"[M]erely redefine any measure which is claimed to be punishment as 'regulation,' and magically, the Constitution no longer prohibits its imposition. . . . [T]he majority's argument is merely an exercise in obfuscation."*¹

I. INTRODUCTION

On July 1, 1993, Stephanie Schmidt, a college student in Leawood, Kansas, was brutally raped and murdered by a former co-worker, Donald Ray Gideon.² Gideon finished serving a ten-year sentence for rape and aggravated sodomy only seven months before taking Ms. Schmidt's life.³ Outraged by their daughter's murder, Stephanie's parents formed a task force to pass legislation that would keep "sexually violent predators" incarcerated for a longer period of time.⁴ The Schmidts' grief, anger, and frustration gained wide public sympathy, which resulted in the Sexually Violent Predators Act of 1994 ("the Act" or "SVPA").⁵

The Sexually Violent Predators Act provides for the civil commitment⁶ of persons who have "a mental abnormality"⁷ and have

1. *United States v. Salerno*, 481 U.S. 739, 760 (1987) (Marshall, J., dissenting).

2. See Greg Kuhl & Ann Spivak, *Leawood Woman Died by Strangling: Sexual Assault, Killing Apparently Took Place Within Hour After She Left Bar with Convicted Rapist*, KAN. CITY STAR, July 29, 1993, at A1.

3. See *id.*

4. See *id.*

5. See John A. Dvorak, *Kansas Passes Death Penalty*, KAN. CITY STAR, April 9, 1994, at A1 (describing the reaction of Gene Schmidt, Stephanie's father, to the passage of more severe punishments for violent criminals). Legislators cited public outrage expressed on questionnaires rather than the desire to deter crime as their justification for enacting the law. See *id.*; see also KAN. STAT. ANN. § 59-29a01 (1994) (legislation which allows for the involuntary civil commitment of sexually violent predators).

6. The SVPA requires a person who is found to be a "sexually violent predator" be "committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or

been convicted of a sexually violent offense or who have a “mental abnormality” which makes them “likely to engage in predatory acts of sexual violence.”⁸ In essence, the Act provides for the involuntary “civil” commitment of sexually violent predators after they have served their full prison sentence.⁹ Ostensibly, the purpose of the Act is to provide treatment for sexually violent predators.¹⁰ After assessing the Act’s actual effects, however, the Supreme Court of Kansas found that treatment was “all but nonexistent” for those committed under the Act.¹¹ Sexually violent predators’ commitments are reviewed yearly to determine whether the predator is still dangerous.¹² Under the review’s standards, “dangerous” means that one is likely to commit another sexually violent crime.¹³ The statute mandates that the annual review be carried out even though the statute specifically admonishes that the treatment needs of sexually violent predators are “very long term.”¹⁴

The Act has been criticized for several reasons, including: (1) the state’s failure to provide treatment for those who are committed;¹⁵ (2)

personality disorder has so changed that the person is safe to be at large.” KAN. STAT. ANN. §59-29a07 (1994 & Supp. 1997). In addition, persons committed “shall be kept in a secure facility and . . . segregated at all times from any other patient under the supervision of the secretary of social and rehabilitation services[.]” *Id.* Furthermore, those who are committed may be confined, housed and managed by the department of corrections provided that those civilly committed have only “supervised incidental contact” with those criminals housed by the department of corrections. *Id.*

7. A “mental abnormality” is defined as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.” KAN. STAT. ANN. § 59-29a02(b) (1994 & Supp. 1997) (amended 1998).

8. *Id.* § 59-29a01.

9. *See id.*

10. *See id.*

11. *See In re Hendricks*, 912 P.2d 129, 136 (Kan. 1996), *rev’d sub nom.* *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997). The Kansas Supreme Court found the fundamental concern of the legislature to be the continued segregation of sexually violent offenders from the public. *See id.* “Treatment with the goal of reintegrating them [those committed under the SVPA] into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. . . . [T]he provisions of the Act for treatment appear somewhat disingenuous.” *Id.*

12. *See* KAN. STAT. ANN. § 59-29(a)08 (1994 & Supp. 1997) (amended 1998).

13. *See id.*

14. *See id.* § 59-29a01. In its interpretation of the statute, the Supreme Court of Kansas found that the State’s failure to provide treatment for sexually violent predators, coupled with the statute’s statement that treatment must be “very long term” made review of the civil commitment futile. *See infra* Part IV.

15. *See In re Hendricks*, 912 P.2d at 136. Specifically, the court stated that the legislature conceded the fact that “sexually violent predators are not amenable to treatment under K.S.A. 59-2901 *et seq.* If there is nothing to treat under 59-2901, then there is no mental illness. In that light, the provisions of the Act for treatment appear

the statute's requirement of "very long term" treatment periods for sexually violent predators, despite the fact that no real treatment is provided;¹⁶ and (3) because the attempt to create a basis for a civil commitment has been heralded as "the most significant preventive *criminal justice* legislation to be presented."¹⁷ These three criticisms, combined with the political and social reality that this piece of legislation was motivated by the "grief, anger and frustration"¹⁸ felt by Stephanie Schmidt's parents, friends and fellow Kansans, have led many to question the purported purposes of the Act.¹⁹ These critics regard the Sexually Violent Predators Act as a method to further punish "monsters"²⁰ after they have been convicted of a crime, in blatant violation of the Double Jeopardy provisions of the Fifth Amendment.²¹

In 1997, the Supreme Court considered these criticisms²² and determined that Kansas's Sexually Violent Predators Act does not violate the Double Jeopardy provisions of the Fifth Amendment or the prohibition against *ex post facto* laws.²³ The Court based its decision on Mr. Hendricks's failure to demonstrate with "the clearest proof"

somewhat disingenuous." *Id.* (discussing the Kansas statute allowing short term involuntary treatment of "mentally ill persons" as opposed to sexually violent predators)

16. See KAN. STAT. ANN. § 59-29a01.

17. Sexually Violent Predators Act, 1994: Hearings on S.B. 525 Before the Senate Judiciary Comm., Kan. Leg. (Feb. 22, 1994) (statement of Robert T. Stephan, Att'y Gen. of the State of Kansas) (emphasis added).

18. See Sexually Violent Predators Act, 1994: Hearings on S.B. 525 Before the Senate Judiciary Comm., Kan. Leg. (Feb. 22, 1994) (statement of Kelly McCaffrey, author of Comment, The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times, 42 U. KAN. L. REV. 887 (1994)).

19. See Sexually Violent Predators Act, 1994: Hearings on S.B. 525 Before the House Judiciary Subcomm., Kan. Leg. (Feb. 22, 1994) (statement of Betty K. Meyers, Legislative liaison [sic] Public Policy Council, Mental Health Associations in Kansas) (dubbing the SVPA the "Stephanie Schmidt Bill" and urging the Kansas legislature to deal with repeat offenders through the criminal justice system rather than through civil commitment); Sexually Violent Predators Act, 1994: Hearings on S.B. 525 Before the Senate Judiciary Comm., Kan. Leg. (Feb. 23, 1994) (letter from Carla Dugger, Assoc. Dir. The American Civil Liberties Union of Kansas and Western Missouri) (criticizing the SVPA as a "vague" civil remedy for a criminal process problem while providing only "an illusion of due process"); see also *In re Hendricks*, 912 P.2d at 136-37 (finding that the primary objective of the Act is to continue incarceration and not to provide treatment; the court also pointed out that Hendricks was susceptible to at least 60 years imprisonment when he was sentenced).

20. See *In re Hendricks*, 912 P.2d at 136.

21. See U.S. CONST. amend. V.

22. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2084-85 (1997), *rev'g In re Hendricks*, 912 P.2d 129 (Kan. 1996).

23. See *id.* at 2086.

that his involuntary commitment had the purpose or effect of negating the civil label ascribed to the statute which provided for his commitment.²⁴ Since the commitment, in the majority's view, did not serve either of the primary objectives of punishment—that is, deterrence or retribution—the commitment did not amount to punishment.²⁵ According to the majority, the Double Jeopardy provisions prohibit only a second punishment, not a “civil” penalty coupled with a criminal punishment.²⁶ However, the majority opinion failed to look at the purposes and effects of the Act, to consider the findings of the Kansas Supreme Court, to follow preceding cases concerning punishment and double jeopardy, or to sufficiently illuminate its definition of punishment.

This Note will briefly describe the traditional division between civil and criminal trials and proceedings and how the distinctions between these two areas of law have eroded within the past century.²⁷ Subsequently, this Note will assess how some legal philosophers have defined punishment, the term which has historically separated criminal and civil law.²⁸ Next, this Note will trace the Supreme Court's treatment of punishment since the early 1960's.²⁹ This Note will then discuss the majority,³⁰ concurring,³¹ and dissenting³² opinions in *Kansas v. Hendricks*.³³ The Note will then criticize the Court's decision in light of previous double jeopardy cases and other states' sexually violent predator laws.³⁴ Finally, this Note concludes that in the absence of a clear meaning of “punishment,” the Fifth Amendment's protections against a police state will continue to be winnowed away by an “administrative state” operating under the guise of “civil” law and regulation.³⁵

24. *See id.* at 2082 (citing *United States v. Ward*, 448 U.S. 242, 248-49) (1980)).

25. *See id.* The majority was comprised of Justice Thomas, Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy. *See id.* at 2076. Justice Kennedy also provided a separate concurring opinion. *See id.* at 2087. Justice Breyer filed a dissenting opinion in which Justices Stevens, Souter and Ginsburg joined. *See id.*

26. *See id.* at 2085 (citing *Witte v. United States*, 515 U.S. 389, 396 (1995)).

27. *See infra* Part II.A.

28. *See infra* Part II.B.

29. *See infra* Part II.C.

30. *See infra* Part II.C.1.

31. *See infra* Part III.C.2.

32. *See infra* Part III.C.3.

33. *See infra* Part III.C.

34. *See infra* Parts IV.A.1-2.

35. *See infra* Part V.

II. BACKGROUND

A. *The Eroding Distinction Between Civil and Criminal Law*

The roots of the distinction between civil and criminal law can be traced to Roman law. In Roman law, certain “wrongs,” such as robbery and theft, were treated as “private” torts, whereas other acts, such as murder, were regarded as “public” crimes.³⁶ The English common law similarly attempted to delineate between criminal and civil law with varying degrees of success, through its use of different types of writs.³⁷ Writs were pursued either by the victim of the wrong or by the Crown.³⁸ The distinction between civil and criminal law, however, was often hard to draw under this system of writs because criminal, tort, and contract laws overlapped.³⁹ Also, prosecutions depended not on the acts of the defendant or accused but on which writ the plaintiff or prosecutor pursued.⁴⁰ Separating criminal procedures from civil procedures did not become possible until a more organized police force or investigating agency was devised.⁴¹ As the state, rather than individuals, assumed the power of investigating wrongs and crimes at its discretion, the number of crimes prosecuted by the state increased, and modern criminal procedure began to take shape.⁴²

The early American distinction between civil and criminal law depended upon whether the state imposed punitive or remedial sanctions.⁴³ Although this distinction seems reasonable, the state’s increasing use of punitive sanctions in civil cases and remedial actions in criminal cases has clouded the distinction and generated hybrid legal

36. See Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 782 (1997) (citing James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29, 38 (1996)).

37. See *id.*

38. See *id.*

39. See David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 83 (1996). The distinction between private actions, be they intentional or negligent, and public prosecutions rested not in the acts of the defendant, but in the writ pursued by the plaintiff/prosecutor. See *id.* Since the differences between crime and tort were decided by the individual victims, delineating a crime from a tort was useless. See *id.*

40. See *id.*

41. See JAY A. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 7, 8 (1969).

42. See *id.* at 13-15.

43. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1796 (1992).

practices.⁴⁴ Attempts to maintain the punitive/remedial distinction between civil and criminal law lasted through the early part of the twentieth century, but the amalgamation of civil procedure and criminal punishment progressed as the number of “hybrid” legal practices expanded.⁴⁵ Some of these “hybrid” practices, which seek punitive ends through civil proceedings, are punitive damages in tort cases, administrative legal procedures for conduct that is generally regarded as criminal, strict liability in certain criminal cases, and civil forfeiture for criminal acts.⁴⁶ This hybridization of criminal and civil law has made it difficult for courts to determine whether to apply the broad protections afforded by criminal law or the more lenient rules provided under civil procedure.⁴⁷

Just as the delineations between criminal and civil proceedings have blurred, the characterization of defendants in criminal and civil settings also has undergone significant change.⁴⁸ No longer are those who face involuntary civil commitment merely considered “mad” and those charged with a crime simply considered “bad”; rather, courts and legislatures have combined these two groups into the “dangerous.”⁴⁹ The original “mad” versus “bad” schism drew upon a distinction between two types of people who broke the law.⁵⁰ “Bad” people were those who broke the law because they were morally corrupt and, therefore, deserving of punishment.⁵¹ Whereas “mad” people were those who broke the law because their mental abnormalities caused them to be psychologically incapable of controlling their behavior.⁵² Hence, the state placed those deemed “mad” in mental asylums in order to provide them with a “cure.”⁵³

44. *See id.* at 1797-98.

45. *See Steiker, supra* note 36, at 783-84. The distinction did not fade easily or quickly, however. *See id.* The attempts at maintaining the sharp distinction can be seen in one opinion from the late 1800's where the judge questioned, “How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies?” *Id.* (quoting *Fay v. Parker*, 53 N.H. 342, 382 (1873)); *see also Mann, supra* note 43, at 1799 (discussing punitive civil sanctions as a “middleground” that provides the basis for the civil/criminal “hybrid”).

46. *See Mann, supra* note 43, at 1871.

47. *See id.*

48. *See Steiker, supra* note 36, at 784.

49. *See id.*

50. *See id.* at 788.

51. *See id.*

52. *See id.*

53. *See id.* at 799.

As the science of psychiatry and psychoanalysis grew through the early and middle twentieth century, many in the mental health field advocated treating crime as a disease. Therefore, their primary goal was to rehabilitate or cure criminals of whatever mental abnormality or illness caused them to commit a crime.⁵⁴ The view that “rehabilitation” was a desirable or attainable goal for wrongdoers came under attack from both ends of the political spectrum in the last half of the twentieth century.⁵⁵ The political left criticized rehabilitation as a means of incarcerating people for an indefinite period of time while imposing unwanted “treatments” that cruelly and unalterably change the individual’s core attributes.⁵⁶ The political right regarded rehabilitation as not being severe enough in administering “just desserts.”⁵⁷ The distinction between treating the “mad” and punishing the “bad” was further weakened because many of those who were purportedly cured often continued to commit crimes after they received treatment.⁵⁸ The tension between wanting to provide treatment to the mentally ill and wanting to protect the public from all people who commit crimes be they “mad,” “bad,” or most likely a bit of both, led to the creation of a new characterization of criminals, the “dangerous.”⁵⁹ Thus, the term

54. See Karl Menninger, *The Crime of Punishment*, SATURDAY REVIEW (1968), reprinted in JOEL FEINBERG, REASON & RESPONSIBILITY 444-445 (7th ed. 1989).

55. See Steiker, *supra* note 36, at 790.

56. See *id.* C. S. Lewis criticized the view that treatment for criminals was a desirable end. See C. S. LEWIS, *The Humanitarian Theory of Punishment*, in GOD IN THE DOCK (1970), reprinted in JOEL FEINBERG, REASON & RESPONSIBILITY 448, 448 (7th ed. 1989). Lewis criticized the Humanitarian Theory, which is that criminals may be healed because it allows foolish and wicked leaders to deprive citizens of their liberty whenever a state of mind is found to be displeasing to these leaders. See *id.* at 450-51. Extreme interpretations of what might result if treatment were instilled upon those who broke the law can be seen in two films, namely, Stanley Kubrick’s *A CLOCKWORK ORANGE*, and Milos Forman’s *ONE FLEW OVER THE CUCKOO’S NEST*. *A CLOCKWORK ORANGE* (Warner Bros. 1971); *ONE FLEW OVER THE CUCKOO’S NEST* (Republic Pictures 1975).

57. See Steiker, *supra* note 36, at 790; see also MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 22-23 (Alan Sheridan trans., Vintage Books 1977) (1979). Foucault discussed the entangling of the judge’s power to punish and her extra non-judicial duties, such as determining whether the defendant is “dangerous” and whether it would be better to commit the defendant to a hospital for treatment or to force the defendant into submission through punishment. See *id.* These considerations were part of what Foucault called the “new power to judge.” *Id.* at 23. The power to judge was “new” in the sense that it was part of a new “scientifico-legal complex” that required the blending of scientific discourses such as sociology, penology, psychology/psychiatry and law when passing sentence. See *id.* This term of “scientifico-legal” demonstrates the eroding division between the criminal and civil realms as is reflected in the very scientific perspectives taken in committing the mentally ill under civil law and the legal rules, powers and ideas of retribution seen under criminal law. See *id.*

58. See Steiker, *supra* note 36, at 790-91.

59. See *id.* at 791.

“dangerous” has permeated the modern criminal law vernacular in order to justify incarcerating those who have broken the law but are mentally defective.⁶⁰ Because the term “dangerous” has dulled the moral culpability wedge that divided the “bad” and “mad,” a number of people who might otherwise have received “civil” treatments instead have been criminally punished.⁶¹

B. Philosopher's Attempts to Define Punishment

Drawing upon the link between moral blame and criminal liability, philosophers for many years have debated the justifications of punishing those who commit criminal acts.⁶² Yet, discussions on what exactly constitutes punishment often have been assumed or ignored by those who argue punishment's justifications.⁶³ H. L. A. Hart's five-part definition of punishment is often regarded as the starting point for defining punishment.⁶⁴ Hart conceives of punishment in the following way:

- (1) [Punishment] must involve pain or other consequences normally considered unpleasant;
- (2) it must be for an offense against legal rules;
- (3) it must be of an actual or supposed offender for his offense;
- (4) it must be intentionally administered by human beings other than the offender; and
- (5) it must be imposed and administered by an authority

60. *See id.*

61. *See id.* at 794.

62. See, e.g., IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 194-95 (W. Hastie trans., T. & T. Clark 1887) (advocating punishment purely for retribution); EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 108-09 (George Simpson trans., The Free Press 1964) (stating that punishment is necessary for the satisfaction of the moral conscience of society). But *see generally* JEREMY BENTHAM, *PRINCIPLES OF PENAL LAW*, in *BENTHAM'S WORKS*, pt.2 bk.1, ch.3 (J. Bowring ed., 1843), *reprinted in* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW & ITS PROCESSES* 115-16 (6th ed. 1995) (discussing the utilitarian views including deterrence and curing criminals); John Andenaes, *General Prevention*, 43 *J. CRIM. L. & CRIMINOLOGY* 176, 179 (1952) (describing the need to focus on general prevention instead of retributive individual prevention for deterrence purposes); Leon Radzinowicz & J.W. Turner, *A Study of Punishment I: Introductory Essay*, 21 *CAN. B. REV.* 91, 91 (1943) (delineating the three main stages of penal policy and the moral philosophies developed over the past 150 years); MICHAEL MOORE, *LAW AND PHILOSOPHY: RETHINKING THE RELATIONSHIP* 238-43 (1984) (arguing for a hybrid theory of punishment resting in part on retributivism and in part on utilitarianism).

63. *See Steiker, supra* note 36, at 799.

64. *See id.* at 800.

constituted by a legal system against which the offense is committed.⁶⁵

These five factors reveal Hart's view of punishment as simultaneously limited yet broad. First, Hart's view on punishment is limited in the sense that punishment can only be derived from an "offense against legal rules."⁶⁶ In making punishment applicable only to the violation of a legal rule, Hart makes punishment a special type of penalty or "unpleasant consequence," distinct from other types of sanctions for violating social norms or the rules of a game.⁶⁷ Hart's view on punishment is broad in the sense that it takes into account all "unpleasant consequences," not simply traditional styles of punishment such as incarceration, corporal punishment, or monetary fines.⁶⁸ On the other hand, Hart's view does not require that the punishment actually be unpleasant for the offender; rather, the consequences must be what are "normally considered unpleasant."⁶⁹

65. H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1968).

66. *Id.* at 5.

67. *See id.* Hart's view supports the following hypothetical: if a professional basketball player were to choke his or her coach, and was consequently fined several thousand dollars and suspended for one year by the sport's oversight organization, this hypothetical player would not technically have been "punished" since he or she did not receive the penalty from an authority constituted by a legal system against which the offense was committed. Similarly, if the coach sued the player in civil court and recovered for the damages incurred, it does not appear that there would be "punishment" in Hart's estimation because the court which would award the judgment would not be "an authority constituted by a legal system *against which the offense was committed.*" *Id.* at 5. (emphasis added). However, if the coach pressed charges and the player was tried for battery in a criminal court and fined, this would be punishment, for it would have been administered to an offender of a legal rule by a constituent of the legal system against which the offense was committed. Therefore, the player might personally find the sanctions imposed by the oversight committee to be more severe than a criminal punishment of prison or community service, but Hart's view would only consider the criminal sanction to be punishment. *See id.*

68. *See id.* In his earlier versions of this definition, Hart used only the word "pain" instead of coupling pain with other "unpleasant consequences." *See Steiker, supra* note 36, at 800.

69. *See HART, supra* note 65, at 4-5. However, some would argue that prisons are not what one would normally consider unpleasant. For example, Fyodor Dostoevsky questioned:

Are there not, also, poor devils who commit crimes in order to be sent to hard labour, and thus to escape the liberty which is much more painful than confident? . . . In the convict prison his work will be less severe, less crushing [than working as a free man]. He will eat as much as he wants, better than he could ever have hoped to eat, had he remained free. On holidays he will have meat, and fine people will give him alms, and his evening's work will bring him in some money.

FYODOR DOSTEVSKY, THE HOUSE OF THE DEAD 57-60 (H. Sutherland Edwards trans., Everyman's Library 1912), reprinted in JOEL FEINBERG, REASON & RESPONSIBILITY 452, 453 (7th ed. 1989).

Joel Feinberg and others have criticized Hart for leaving out one of the most basic and fundamental characteristics of punishment, namely, the notion of “stigma,”⁷⁰ “blame,”⁷¹ or an expression of “resentment and indignation”⁷² toward the criminal wrongdoer.⁷³ Other philosophers have gone beyond Feinberg’s concept of “blame” or “resentment and indignation” and have offered the view of “defeating” the wrongdoer.⁷⁴ According to this view, punishment should be a means of erasing or assuaging the moral injuries that the criminal has inflicted on his victim or others.⁷⁵

C. S. Lewis argued that moral blame is necessary in punishment.⁷⁶ Lewis asserted that “desert,” meaning deserving of retribution based on the degree of an act’s wickedness, “is the only connecting link between punishment and justice.”⁷⁷ That is, a punishment for an act of wickedness only can be just if it is deserved.⁷⁸ According to Lewis, a punishment may deter others or rehabilitate the criminal, but one cannot ask whether deterrence is just; one only can ask whether it deters.⁷⁹ Similarly, one cannot ask whether rehabilitation is just; one only can ask whether the rehabilitation succeeds in “curing” the

Stephanie Schmidt’s father echoed the sentiment expressed by the great Russian writer when he lamented that, “the system rewards criminals He’ll [Gideon, Stephanie’s killer] get to play basketball and watch color TV and cable. It’s more comfortable in there.” Christine Vendel, *Angry Parents of Victim Ask: ‘Why Was This Man Released?’*, KAN. CITY STAR, July 29, 1993, at A10. In response to Mr. Schmidt’s complaint, followers of Foucault would argue that the unpleasantness of incarceration is not the loss of material objects, rather the loss of “individual liberty which is regarded both as a right and as property. . . . Physical pain, the pain of the body itself, is no longer the constituent element of the penalty. From being an art of unbearable sensations punishment has become an economy of suspended rights.” FOUCAULT, *supra* note 57, at 11.

70. Joel Feinberg, *The Expressive Function of Punishment*, in 4 *PHILOSOPHY OF LAW: CRIMES AND PUNISHMENTS* 87, 91-92 (Jules L. Coleman ed., 1994).

71. *Id.*

72. *Id.* at 93.

73. *Id.* Hart’s omission of a notion of “stigma” or “resentment and indignation” is based on his observation that there are occasions, such as strict liability crimes, when the notion of blame is generally separated from punishment. See HART, *supra* note 65, at 223. Furthermore, Hart’s theory of legal positivism asserts that law and morality are not necessarily connected or related; thus, the legal determination to impose punishment does not necessarily require the moral determination that the defendant or wrongdoer is morally “bad.” See H. L. A. HART, *THE CONCEPT OF LAW* 7-8 (1961).

74. See Streiker, *supra* note 36, at 803.

75. See *id.*

76. See LEWIS, *supra* note 56, at 448.

77. *Id.*

78. See *id.*

79. See *id.*

criminal.⁸⁰ It only makes sense to ask whether the punishment was a just dessert—in other words, whether the punishment matched the wickedness displayed by the criminal.⁸¹

C. *The Supreme Court's Views on Punishment and Double Jeopardy*

Although theorists and philosophers have the freedom to draw upon many sources when assessing what punishment is or should be, courts work within the confines of constitutions, case law, statutes, and federalism when considering what constitutes punishment. For these reasons, the Supreme Court has been reluctant to define “punishment” concretely.⁸²

Despite the Court's reluctance to provide a clear definition of punishment, determining when punishment exists is necessary to provide a measure for distinguishing between civil sanctions and criminal punishments.⁸³ As noted earlier, the division between civil and criminal sanctions determines whether a person's rights against double jeopardy, as provided in the Fifth Amendment, have been

80. *See id.*

81. *See id.* While incarceration might be called treatment, Lewis opined that there is really no difference between incarceration and treatment. *See id.* at 449-50. Specifically, Lewis said:

To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of “normality” hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success—who cares whether this is called Punishment or not? That it includes most of the elements for which any punishment is feared—shame, exile, bondage, and years eaten by the locust—is obvious. Only enormous ill-desert could justify it

Id.

82. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). Justice Goldberg for the majority stated that determining whether a statute is penal or regulatory in character has been “extremely difficult and elusive.” *Id.* He continued by listing seven factors that should be considered. *See id.* Furthermore, Justice Goldberg stated that the factors are all relevant to determining whether a sanction is penal or regulatory and that the evaluation of these factors “may often point in differing directions.” *Id.*

83. *See id.* at 167 (providing a list of factors which indicate when the purpose of a civil sanction is punishment); *see also infra* Part II. The factors include the following: (1) “whether the sanction involves an affirmative disability or restraint”; (2) “whether it has historically been regarded as a punishment”; (3) “whether it comes into play only on a finding of *scienter*”; (4) “whether its operation will promote the traditional aims of punishment—retribution and deterrence”; (5) “whether the behavior to which it applies is already a crime”; (6) “whether an alternative purpose to which it may rationally be connected is assignable for it”; and (7) “whether it appears excessive in relation to the alternative purpose assigned.” *Kennedy*, 372 U.S. at 168-69.

violated.⁸⁴ The Court has held that there are three occasions⁸⁵ in which a person could be said to be "twice put in jeopardy of life or limb."⁸⁶ These three circumstances are: "a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense."⁸⁷ The third of these provisions, the prohibition against multiple punishments, has caused the greatest contention among the Supreme Court, particularly within the past ten years.⁸⁸

1. *Kennedy v. Mendoza-Martinez*: The Court's Early Efforts to Establish Criteria Which Separate Civil Sanctions from Criminal Punishment

In the early 1960s, the Supreme Court consolidated several of its previous Double Jeopardy decisions into a list of factors to assist courts in determining when Congress sought to punish through civil procedures.⁸⁹ In *Kennedy v. Mendoza-Martinez*, the Supreme Court

84. See U.S. CONST. amend. V. The Double Jeopardy provision states in full, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Id.*; see also *Kennedy*, 372 U.S. at 168-69 (listing factors which can be indicative of punishment); *United States v. Halper*, 490 U.S. 435, 449 (1989) (holding that civil sanctions which may not be characterized as remedial, but as serving the purposes of deterrence or retribution can constitute punishment), *overruled by Hudson v. United States*, 118 S.Ct. 488 (1997); *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (holding that a tax which is 800% of the value of seized marijuana could be regarded as punitive), *overruled in part as stated in State v. Uher*, 1997 Ohio App. LEXIS 1708 (Ohio Ct. App. 1997). *But see Kurth Ranch*, 511 U.S. at 802-03 (Scalia, J., dissenting) (stating that the Court's holding is improper because the double jeopardy clause prohibits one from twice being subject to prosecution, not punishment, and that a more reasonable justification for the Court's decision would be under the Eighth Amendment, which prohibits excessive fines or penalties).

85. See *Halper*, 490 U.S. at 440.

86. U.S. CONST. amend. V.

87. *Halper*, 490 U.S. at 440 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

88. See, e.g., *Kurth Ranch*, 511 U.S. at 798 (Scalia, J., dissenting). Justice Scalia stated that "'to be put in jeopardy' does not remotely mean 'to be punished,' so by its terms this provision prohibits, not multiple punishments, but only multiple prosecutions." *Id.* (Scalia, J., dissenting). In another case, Justice Scalia declared that the protections against multiple punishments by way of the Double Jeopardy Clause is unworkable and creates inconsistent results. See *Witte v. United States*, 515 U.S. 389, 406-07 (1995) (Scalia, J., concurring in part, dissenting in part). In his dissent in *Witte*, Justice Stevens opined that the Court had strayed from its earlier decisions that multiple punishments are prohibited by the Double Jeopardy Clause. See *id.* at 413 (Stevens, J., dissenting) (citing *Halper*, 490 U.S. at 448; *Kurth Ranch*, 511 U.S. at 779-80).

89. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (citing *Flemming v. Nestor*, 363 U.S. 603, 617 (1960); *Trop v. Dulles*, 356 U.S. 86, 96-7 (1958); *United States v. Lovett*, 328 U.S. 303, 316 (1946); *United States v.*

confronted the issue of whether citizens who had served a prison sentence for avoiding military duty could be later stripped of their American citizenship.⁹⁰ The Court held that determining whether a statute is punitive or regulatory in nature begins by first looking to whether there were “objective manifestations of congressional purpose [which] indicate[d] conclusively that the provisions in question can only be interpreted as punitive.”⁹¹ To demonstrate the penal purpose of the statute under the Court’s consideration, Justice Goldberg looked to congressional debates and hearings, as well as interpretations of lower courts of the predecessor law, to determine whether the drafters of the law perceived the sanctions imposed on deserters to be penalties and “punishment” for a “crime.”⁹² In considering the most recent version of that law, the Court analyzed a letter from the Attorney General as well as a statement in the Congressional Record by Senator Russell.⁹³ Both the Senator and the Attorney General regarded the legislation’s sanctions as a penalty.⁹⁴ The letter from the Attorney General and Senator Russell’s statement, combined with the legislative history of the preceding statute, indicated that the statute was intended to be punitive.⁹⁵

Without such secondary information, the Court would have applied the following considerations to the statute to determine whether on its face the statute was punitive:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the

Constantine, 296 U.S. 287, 295 (1935); Child Labor Tax Case, 259 U.S. 20, 37-38, 43 (1922); Helwig v. United States, 188 U.S. 605, 610-12 (1903); Wong Wing v. United States, 163 U.S. 228, 237-38 (1896); Mackin v. United States, 117 U.S. 348, 350-52 (1886); *Ex parte* Wilson, 114 U.S. 417, 426-29 (1885); *Ex parte* Garland, 4 Wall. 333, 377 (1866); Cummings v. Missouri, 4 Wall. 277, 320-21 (1866).

90. *Id.* at 146-47.

91. *Id.* at 169.

92. *See id.* at 171-74.

93. *See id.* at 180.

94. *See id.* at 183. Senator Russell stated in part that “this bill would merely impose a similar *penalty* on those who are not subject to the jurisdiction of our courts, *the penalty* being the same as would result in the case of those who are subject to the jurisdiction of our courts.” *Id.* (emphasis added) (citing 90 CONG. REC. S7629 (1944)).

95. *See id.*

alternative purpose assigned⁹⁶

The Court did not conclude that the statute is considered inherently punitive if some or all of the factors listed above are found within the statute.⁹⁷ Rather, the Court stated that the presence of these factors would *tend to indicate* the punitive nature of the statute.⁹⁸ Accordingly, the list of criteria or factors put forth by the Court were not meant to be exhaustive or complete, and the application of the factors may lead in “differing directions.”⁹⁹

Following the pronouncement in *Kennedy v. Mendoza-Martinez*, the issue of whether a civil sanction constitutes a punishment was not frequently revisited by the Court. Even when the issue arose, reliance upon or utilization of the case was sporadic at best.¹⁰⁰

2. The 1980s: The Rebirth of the *Kennedy v. Mendoza-Martinez* Decision

In 1980, the Supreme Court revisited the issue of whether civil sanctions constitute punishment.¹⁰¹ In *United States v. Ward*, the defendant owned an oil company which spilled waste into a waterway.¹⁰² In accordance with a federal civil statute, Ward reported the spill and was fined \$500.¹⁰³ Ward appealed the fine and argued

96. *See id.* at 168-69 (citations omitted).

97. *See id.* at 169.

98. *See id.*

99. *See id.* at 169. An example of differing conclusions in the application of the factors listed by the Court can be seen in *Bell v. Wolfish*, 441 U.S. 520 (1979). In determining whether pretrial detention of defendants in criminal cases constituted punishment, the majority of the Court held that the *Kennedy v. Mendoza-Martinez* factors tended to show that such detention was not punishment. *See id.* at 538-39. Contrarily, Justice Marshall in his dissent viewed the *Kennedy v. Mendoza-Martinez* considerations as favorable to his position that the pretrial detainment of defendants in criminal cases does constitute punishment. *See id.* at 564-65 (Marshall, J., dissenting).

100. *See, e.g., One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 233-37 (1972) (per curiam). The Court considered whether the forfeiture of an assortment of jewelry under a civil statute constituted a punishment. *See id.* at 233. In concluding that the forfeiture did not constitute a punishment, the Court did not even mention *Kennedy v. Mendoza-Martinez*, much less discuss its seven factors. *See id.* at 237. The Court determined that the statutory scheme sufficiently distinguished criminal and civil procedures and sanctions and that the sanctions were a “reasonable form of liquidated damages” which served to reimburse the Government for expenses incurred in enforcing the law. *See id.* at 236-37.

101. *See United States v. Ward*, 448 U.S. 242 (1980). While the Court was not considering punishment in terms of the Double Jeopardy Clause, its considerations were still focused on whether a civil sanction was punitive, thereby giving rise to protections against compulsory self-incrimination. *See id.* at 247-48; *see also* U.S. CONST. amend. V.

102. *See Ward*, 448 U.S. at 246.

103. *See id.* at 246-47.

that the reporting requirements of the statute in question violated his privilege against compulsory self-incrimination.¹⁰⁴ In order to determine whether the \$500 Ward paid was punitive, the Court assessed whether the statute was criminal, notwithstanding the “civil” label ascribed to it.¹⁰⁵

Concluding that the sanction was not a punishment, the Court reiterated that statutory construction determined whether a sanction was punitive.¹⁰⁶ If a statute expressly or implicitly creates a criminal punishment, then that label shall stand.¹⁰⁷ If, however, the statute expressly or implicitly creates a civil sanction, then the sanction shall be assessed to determine whether by the “clearest proof” that the statute is so punitive in purpose or effect as to negate the civil intention.¹⁰⁸ The Court considered the *Kennedy v. Mendoza-Martinez* factors but only found the fifth factor of whether “the behavior to which [the penalty applies] is already a crime,” favorable to Ward.¹⁰⁹ The statute that would find Ward guilty of a strict liability crime¹¹⁰ was drafted seventy years before the statute that would impose a civil sanction.¹¹¹ Based on its rationale in *One Lot Emerald Cut Stones v. United States*,¹¹² the Court ruled that in as much as a separation of criminal punishments and civil sanctions within a statute was important, a chasm of seventy years between a statute creating criminal punishments and one establishing civil sanctions was sufficient to dilute the importance of the fifth *Kennedy v. Mendoza-Martinez* factor.¹¹³

104. See *id.* at 247. See generally U.S. CONST. amend. V (stating “nor shall [any person] be compelled in any criminal case to be a witness against himself”).

105. See *Ward*, 448 U.S. at 248.

106. See *id.*

107. See *id.*

108. See *id.* at 249 (citing *Flemming v. Nestor*, 363 U.S. 603, 617-21 (1960)).

109. See *id.* at 249-50 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

110. See 33 U.S.C. § 407 (1994).

111. See 33 U.S.C. §1321(b)(3,5,6) (1994).

112. 409 U.S. 232 *passim* (1972); see also *supra* note 100.

113. See *Ward*, 448 U.S. at 250. The fifth *Mendoza-Martinez* factor inquires whether the act sanctioned in a purportedly civil proceeding is already a crime. See *Kennedy*, 372 U.S. at 168. The Court in *One Lot Emerald Cut Stones v. United States* determined that sanctions which are distinct and contained in different parts of the statutory scheme tend to indicate that the civil sanction is not related to the criminality of the same conduct. See *One Lot Emerald Cut Stones*, 409 U.S. at 236. The *Ward* Court similarly concluded that the sanctions involved in this case were not meant to be criminal punishments because the remedies were in a separate provision than the criminal remedies, and because the civil sanctions were adopted seventy years after the criminal punishments, thereby suggesting that the legislature did not intend the civil sanctions

3. *United States v. Halper*: The Court Broadens its Inquiry from the *Kennedy v. Mendoza-Martinez* Factors to the Purpose of the Civil Sanction

Following *United States v. Ward*, the Court again faced the issue of whether a sanction was criminal or civil in nature in *United States v. Halper*.¹¹⁴ Convicted of filing false Medicare claims, the defendant, Dr. Halper, was ordered to serve a two-year prison sentence and pay a \$5,000 fine.¹¹⁵ Subsequently, the Government brought a civil action for the same Medicare violations.¹¹⁶ The statute allows the Government to assess \$2,000 for each violation of the Medicare laws; hence the Government sought damages totaling \$130,000 even though Dr. Halper only filed \$585 worth of false claims.¹¹⁷ The district court determined that a judgment which was 220 times greater than the actual damages incurred by the Government would be punitive and, therefore, in violation of the Double Jeopardy Clause.¹¹⁸ The court then lowered the fine to \$1,170 plus costs.¹¹⁹ The United States took direct appeal to the United States Supreme Court, which unanimously vacated the \$1,170 judgment entered by the district court but agreed that \$130,000 sought by the Government was so extreme as to be punitive.¹²⁰ Accordingly, the penalty allowable under the statute constituted an unconstitutional second punishment.¹²¹

In holding that a civil sanction that serves the goals of punishment can violate the Double Jeopardy Clause of the Constitution, Justice Blackmun traced the historical roots of the prohibition against multiple punishments in Anglo-American law.¹²² In his decision, Justice Blackmun cited the 1641 "Body of Liberties" from the Colony of Massachusetts, James Madison's initial version of the Double Jeopardy Clause, and *Ex parte Lange* from 1874.¹²³ After establishing

to serve a punitive intent. See *Ward*, 448 U.S. at 250-51.

114. 490 U.S. 435 (1989).

115. See *id.* at 437.

116. See *id.* at 438.

117. See *id.* at 439 (citing *United States v. Halper*, 660 F.Supp 531, 533 (S.D.N.Y. 1987)) (stating that damages could also possibly include the cost of investigating and prosecuting the case).

118. See *Halper*, 490 U.S. at 439-40; see also U.S. CONST. amend. V.

119. See *Halper* at 490.

120. See *id.* at 452.

121. See *id.*

122. See *id.* at 440.

123. See *id.* The Body of Liberties from the Colony of Massachusetts stated: "No man shall be twice sentenced by Civil Justice for one and the same Crime, offense, or Trespass." *Id.* (citing American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910)). The initial Double Jeopardy Clause, by James Madison,

historical precedent for its decision, the Court went on to reject the Government's argument that earlier cases¹²⁴ barred the Court from determining that civil sanctions, even sanctions in excess of the Government's damages, were actually a punishment.¹²⁵

The Court also distinguished *Helvering v. Mitchell*, a case the Government heavily relied upon, from the case at hand.¹²⁶ The defendant in *Mitchell*, unlike Dr. Halper, was acquitted of criminal charges before he was subsequently sued by the government in a civil suit.¹²⁷ Therefore, there was no possibility of a double punishment even if the civil sanctions were regarded as criminal punishment.¹²⁸ In addition, the Court read Justice Brandeis' *Mitchell* opinion, which distinguished between the Double Jeopardy Clause's prohibition against "attempting a second time to punish criminally" and its prohibition against "merely punishing twice," as leaving open the possibility that a civil sanction could constitute punishment.¹²⁹ The Court reasoned that because the word "criminally" is conspicuously missing from the phrase "merely punishing twice," *Mitchell* explicitly allowed for the case in which a civil penalty could violate Double

explicitly focused on multiple punishment proclaiming that, "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." See *id.* (quoting 1 Annals of Cong. 434 (1789-1791) (J. Gales ed. 1834)). Finally, the Court in *Ex parte Lange* found, "[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Ex parte Lange*, 18 Wall. 163, 168 (1874), *overruled as stated in* *United States v. Busic*, 639 F.2d 940 (3d Cir. 1981).

124. See *Halper*, 490 U.S. at 441 (citing *Helvering v. Mitchell*, 303 U.S. 391, 398-99 (1938)) (holding that a 50% tax imposed on those who intended to evade income tax was not a criminal punishment). The Government also relied on *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), *superseded by* 31 U.S.C. § 232(C) (1976), in which the Court denied a Double Jeopardy claim asserted by defendants who pled *nolo contendere* to defrauding the government and were fined \$54,000 in a criminal proceeding and subsequently had to pay a \$315,000 in a *qui tam* civil action for the same violations. See *Halper*, 490 U.S. at 443-44.

125. See *Halper*, 490 U.S. at 441-42.

126. See *id.* at 444.

127. See *Helvering v. Mitchell*, 303 U.S. 391, 396 (1938).

128. See *id.* at 398-99. The only possibility of a Double Jeopardy problem in *Mitchell* was if the 50% tax levied on the defendant for evading his income taxes was intended as punishment thereby making the proceeding criminal and violating the defendant's Fifth Amendment right to be free from being tried twice in a criminal proceeding. See *id.* at 398. The Court in *Mitchell* determined that the 50% tax was not arbitrarily arrived at and merely provided the Government indemnification for its losses; thus, the sanction was remedial and not punitive in nature. See *id.* at 401. Furthermore, the statute in *Mitchell* was drafted so as to create two distinct provisions imposing sanctions, one criminal and one civil, and the 50% tax was held to be a civil sanctions and not a criminal punishment. See *id.* at 402.

129. See *Halper*, 490 U.S. at 443 (quoting *Helvering*, 303 U.S. at 399).

Jeopardy.¹³⁰

Although *United States ex rel. Marcus v. Hess* appeared on the surface to be identical to *Halper*, Justice Blackmun similarly distinguished it from that case.¹³¹ In *Hess*, the defendants entered a *nolo contendere* plea in a criminal proceeding for bidding collusively on a public-works project.¹³² The defendants paid a \$54,000 criminal fine and were subsequently sued in a *qui tam* action for \$315,000, which represented a \$2,000 civil penalty for each violation plus double the amount of actual damages and the costs of the suit.¹³³ The Court rejected the defendants' position that these amounts represented a double punishment, reasoning that the statute in *Hess* sought to ensure that the Government would be made completely whole.¹³⁴ Additionally, the Government only received \$150,000 from the *qui tam* action, although its actual damages totaled \$101,500.¹³⁵ These two amounts were regarded by the Court as roughly equal.¹³⁶

Unlike the sanctions imposed in earlier cases, the sanction demanded by the Government in *Halper* did not even closely approximate the Government's actual costs.¹³⁷ To remedy this excessive penalty, the Court concluded that the "criminal" or "civil" label was not of paramount importance in determining whether the double jeopardy provisions apply.¹³⁸ Rather, a double jeopardy examination focuses on whether the goals of the sanctions are punitive or remedial.¹³⁹ Therefore, the Double Jeopardy Clause prohibits the State from subjecting a defendant to an additional civil sanction if two criteria are met: (1) the civil sanction serves no rational relation to the goal of making the Government whole; and (2) the sanction may be characterized as serving the goals of punishment, namely, deterrence or retribution, even though the defendant already has been subjected to a criminal punishment.¹⁴⁰ This decision also ostensibly protects

130. *See id.*

131. *See id.* at 443-45 (discussing *Hess*, 317 U.S. at 551-52).

132. *See Hess*, 317 U.S. at 539, 545.

133. *See id.* at 540.

134. *See id.* at 548-49.

135. *See id.* at 545.

136. *See id.* at 549. The Court did not express an opinion as to whether a *qui tam* action should be regarded as a suit between private parties, or between the United States and another party. *See United States v. Halper*, 490 U.S. 435, 451 n.11 (1989), *overruled by Hudson v. United States*, 118 S. Ct. 488 (1997).

137. *See Halper*, 490 U.S. at 446.

138. *See id.* at 447.

139. *See id.* at 447-48.

140. *See id.* at 499-50.

against the possibility that the Government could seek a second punishment under the guise of a “civil” proceeding if the Government is dissatisfied with the punishment obtained in the first proceeding.¹⁴¹

4. The Court Retreats from Its *Halper* Decision

The *Halper* decision was unanimous, so even if the “retreat” was just the adoption of Scalia and Thomas, Scalia had to depart from his earlier supporting position of the *Halper* majority. Despite the unanimous judgment in *Halper*, the notion that excessive civil sanctions could constitute punishment under the Double Jeopardy Clause has been sharply criticized since 1989.¹⁴² For example, in *Department of Revenue of Montana v. Kurth Ranch* (“Kurth Ranch”), a five-member majority¹⁴³ ruled that a tax that required the defendants to pay 800% of the value of the marijuana they harvested was so punitive that it invoked the protections against multiple punishments under Double Jeopardy provisions of the Constitution.¹⁴⁴ Justices Scalia and Thomas sharply criticized this opinion as well as the *Halper* decision for deviating from the language of the Double Jeopardy Clause.¹⁴⁵ According to Justice Scalia, the Fifth Amendment protects only against multiple criminal trials, not multiple punishments.¹⁴⁶ Thus, the majority’s decision in *Kurth Ranch*, along with *United States v. Halper*, was incorrectly based on 120 years of dicta.¹⁴⁷ The *Halper* decision was similarly criticized the following term in *Witte v. United States*.¹⁴⁸

141. See *id.* at 451 n.10.

142. See *Hudson*, 118 S.Ct. at 494 (stating that the *Halper* decision was “ill considered” and deviated from traditional double jeopardy doctrine); see also *Witte v. United States*, 515 U.S. 389, 406-407 (1995) (Scalia, J., concurring); *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 800-803 (1994) (Scalia, J. dissenting).

143. Justice Stevens wrote the opinion of the Court with which Justices Kennedy, Souter, Breyer and Ginsburg joined. See *Kurth Ranch*, 511 U.S. at 767-84. Chief Justice Rehnquist and Justice O’Connor each filed dissenting opinions that were based upon the view that the Montana tax was reasonably related to remedial state purposes. See *id.* at 785-91 (Rehnquist, J., dissenting); see *id.* at 792-98 (O’Connor, J., dissenting). Justice Scalia’s dissent, which was joined by Justice Thomas, was based on the view that the Fifth Amendment does not protect against multiple punishments. See *id.* at 798-808 (Scalia, J., dissenting).

144. See *id.* at 783-84 (citing *Halper*, 490 U.S. at 452); U.S. CONST. amend. V.

145. See *Kurth Ranch*, 511 U.S. at 798-808 (Scalia, J., dissenting).

146. See *id.* at 804-05 (Scalia, J., dissenting).

147. See *id.* at 800 (Scalia, J., dissenting) (citing *Halper*, 490 U.S. at 452; *Ex parte Lange*, 85 U.S. (18 Wall) 163, 170 (1873)).

148. See *Witte v. United States*, 515 U.S. 389, 406-07 (1995) (Scalia, J., concurring). In sentencing the defendant for his guilty plea of conspiring to possess marijuana with the intent to distribute, which occurred in 1990, the trial court judge took

The most significant blow to Halper was *Hudson v. United States*.¹⁴⁹ In *Hudson*, bankers who made unlawful loans in order to benefit themselves were debarred from the banking industry and assessed penalties reaching \$16,500.¹⁵⁰ Subsequently, the bankers were tried in criminal court for the same conduct which precipitated the penalties levied by the Office of the Comptroller of the Currency.¹⁵¹ Because of the *Halper* decision, the District Court dismissed the charges against Hudson, which were based on monetary sanctions.¹⁵² The Court of Appeals, however, reversed the District Court and concluded that the fines imposed were not so grossly disproportionate as to render them punishment for double jeopardy purposes.¹⁵³ In granting certiorari, the Court took this opportunity to revisit *Halper* and put its “unworkable”¹⁵⁴ and “ill considered”¹⁵⁵ test “back in [its] bottle.”¹⁵⁶ Under *Halper*, one would not know whether civil sanctions that are imposed following a criminal trial are so severe as to constitute criminal punishment until after the trial has proceeded to judgment.¹⁵⁷ Because double jeopardy could not be considered until after the conclusion of the second trial, the majority criticized *Halper* as failing to prevent the government from “even attempting a second time to

into account Witte’s involvement in a conspiracy to possess marijuana and cocaine that occurred in 1991 and was not part of Witte’s plea. *See id.* at 393. The judge’s consideration of this earlier conduct resulted in an increased sentence under United States Sentencing Guidelines. *See id.* at 395. When Witte was subsequently indicted for the 1991 cocaine possession conspiracy, Witte argued that he had already been punished for this act and could not be punished again under the Double Jeopardy Clause. *See id.* at 394-95; U.S. CONST. amend. V. The Supreme Court rejected Witte’s argument that this was a multiple punishment and held that the “use of evidence of related criminal conduct to enhance a defendant’s sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause.” *Witte*, 515 U.S. at 399 (citing *Williams v. Oklahoma*, 358 U.S. 576, 586 (1959)). Justice Scalia viewed the Court’s decision as completely inconsistent with the holding in *Halper* and stated that the Court “created a right against multiple punishments *ex nihilo*[;] we now allow that right to be destroyed by the technique used on the petitioner here” *Witte*, 515 U.S. at 407 (Scalia, J., concurring). Had the Court in *Halper* not deviated from the language of the Fifth Amendment, the inconsistent result reached in this case never would have occurred. *See id.* (Scalia, J., concurring).

149. *See Hudson*, 118 S. Ct. at 491.

150. *See id.* at 492.

151. *See id.* at 492-93.

152. *See id.* at 492.

153. *See id.*

154. *Id.*

155. *Id.*

156. *Id.* at 497 (Scalia, J. concurring) (citing *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 803-05 (1994) (Scalia, J. dissenting), which compared the aberration of *Halper* to a genie that has escaped its bottle).

157. *See id.* at 495.

punish criminally.”¹⁵⁸

While maintaining the central holding in *Halper*, Chief Justice Rehnquist’s opinion significantly limited the *Halper* opinion and reclaimed *Kennedy v. Martinez-Mendoza* and *Ward* as the appropriate cases to be employed in determining whether a civil sanction in reality constitutes a criminal punishment.¹⁵⁹ Based on the *Ward* and *Martinez-Mendoza* opinions, the Court employed a two-prong test for determining whether or not a successive criminal punishment has been imposed in violation of the Double Jeopardy Clause.¹⁶⁰ Inquiry begins with determining whether the legislature, in establishing penalties, expressly or implicitly preferred either the label of civil or criminal.¹⁶¹ Subsequently, if the intention of the legislature was to impose a civil sanction, then the Court will ask whether the statute was so punitive in purpose or effect so as to transform the civil sanction into a civil penalty.¹⁶² The second prong relating to the punitive purpose or effect can be assessed based on the guideposts provided in *Kennedy v. Mendoza-Martinez*.¹⁶³ The Court concluded that while the sanctions imposed in this case, including money penalties and debarment, were deterrents to others who might engage in the same activity as Hudson, the “mere presence” of deterrence, one potential goal for punishment, was “insufficient to render the sanction criminal” for double jeopardy purposes.¹⁶⁴

Justice Scalia’s concurrence applauded the majority’s conclusion that *Halper* was ill-considered and unworkable but wrote separately to reiterate his belief that the Double Jeopardy Clause prohibits successive criminal prosecutions, not successive punishments.¹⁶⁵ Justice Scalia also viewed the majority as creating a reformulation of the Court’s double jeopardy analysis, which would only prohibit multiple punishments that stem from successive criminal prosecutions.¹⁶⁶

158. *Id.* (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)).

159. *See id.* at 493.

160. *See id.* Chief Justice Rehnquist read *Halper* as establishing one factor listed in *Kennedy v. Mendoza-Martinez*, namely whether the sanction was excessive in relation to the alternative purpose assigned—as dispositive. *See id.*

161. *See id.*

162. *See id.* (citing *United States v. Ward*, 448 U.S. 242, 248-49 (1980)); *see also* *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956).

163. *See Hudson*, 118 S. Ct. at 493; *see also supra* Part II.C.1 (discussing the *Kennedy v. Mendoza-Martinez* decision).

164. *Hudson*, 118 S.Ct. at 496.

165. *See id.* at 496-97 (Scalia, J., concurring).

166. *See id.* at 497 (Scalia, J., concurring).

While Justice Stevens concurred in the ultimate judgment that *Hudson* could be susceptible to criminal sanctions following civil penalties, Justice Stevens rejected the majority's rationale.¹⁶⁷ Justice Stevens believed that the criminal trial was based on different elements than the acts that substantiated the preceding civil sanctions; therefore, there was no potential double jeopardy.¹⁶⁸ Justice Stevens' opinion went on to criticize the majority's hasty treatment of *Halper* because the holding in *Halper* was narrow¹⁶⁹ and was to be used "for the rare case."¹⁷⁰ Justice Stevens concluded by agreeing with the majority that the government cannot use the "civil" label to implement further punishments after a criminal sanction has already been imposed.¹⁷¹

5. The Court's Punishment Analysis When Civil Sanctions Involve Committing Sexually Violent Persons

In a case that was decided between the dates of the *Ward* and *Halper* decisions, the Court considered whether an Illinois statute that allowed the State to involuntarily commit sexually violent persons in order to provide them treatment in lieu of prison actually constituted a criminal proceeding.¹⁷² In *Allen v. Illinois*, the Illinois attorney general decided to pursue an involuntary commitment of the defendant, Terry Allen, as a sexually dangerous person after the criminal charges of "unlawful restraint and deviate sexual assault" against him were dropped for lack of probable cause and again after Allen was recharged by indictment.¹⁷³ The commitment proceeding required Mr. Allen to submit to psychological evaluations to determine if he was mentally ill or had criminal propensities to commit sexual assaults.¹⁷⁴ Mr. Allen protested that these examinations violated his Fifth Amendment right against self-incrimination.¹⁷⁵ In order for his arguments to succeed, Mr. Allen had to show that the proceedings were indeed criminal and

167. *See id.* at 497-501 (Stevens, J., concurring).

168. *See id.* at 497 (Stevens, J., concurring) (citing *Blockburger v. United States*, 284 U.S. 299 (1932)).

169. *See id.* at 498 (Stevens, J., concurring) (citing *United States v. Ursery*, 116 S.Ct. 2135, 2145 n.2 (1996) (stating that *Halper* was not a "sweeping change in the law," but instead a very "narrow" decision).

170. *Id.* at 499; *see Halper v. United States*, 490 U.S. 435, 449 (1989) (per curiam) (stating that the rare case in which this rule was to be applied was where a person has already been punished in a criminal prosecution and is subsequently subjected to a civil sanction which is disproportionate to the damages he has caused).

171. *See Hudson*, 118 S. Ct. at 499 (Stevens, J., concurring).

172. *See Allen v. Illinois*, 478 U.S. 364 (1986) (5-4 decision).

173. *Id.* at 365-66.

174. *See id.* at 366.

175. *See id.*

not civil.¹⁷⁶ Mr. Allen argued that because his commitment proceeding was based upon an alleged criminal act and provided many of the same protections granted in a criminal hearing, the proceeding was criminal.¹⁷⁷ In rejecting these arguments, the Court stated that Illinois disavowed any interest in punishment by providing treatment for those it commits and allowing those committed to be released after “the briefest time in confinement.”¹⁷⁸ The State was not acting out of retribution or seeking to deter crime.¹⁷⁹ Mr. Allen’s past criminal behavior was not used as a basis for punishment, but as a predictor of future behavior.¹⁸⁰ Had the State failed to provide treatment, and had Mr. Allen been able to demonstrate that he would not be treated any differently than a prisoner, then the majority surmised that “this might well be a different case.”¹⁸¹

In a dissent joined by three other justices, Justice Stevens stated that “[w]hen the criminal law casts so long a shadow on a putatively civil proceeding, I think it clear that the procedure must be deemed a ‘criminal case’ within the meaning of the Fifth Amendment.”¹⁸² The dissenting Justices viewed the label of “sexually dangerous person” to be so stigmatizing as to be “at least as serious as a guilty verdict in a typical criminal trial.”¹⁸³ Moreover, the commitment was indefinite, thereby allowing for a much longer imprisonment than a mere finding of guilt on an analogous charge.¹⁸⁴ Furthermore, the proceeding was prompted by a previous criminal charge and drew upon criminal burdens of proof and definitions contained in criminal codes, all of which tended to show that the proceeding was indeed criminal in effect.¹⁸⁵ The dissent summarized its view by stating that a civil commitment proceeding that: is triggered by a criminal incident; makes the state the prosecuting authority; proceeds only if a criminal offense is established; uses many of the protections of a criminal proceeding, and; has the same consequences as incarceration in the state’s prison¹⁸⁶

176. *See id.* at 368-69.

177. *See id.* at 370-71.

178. *Id.* at 370.

179. *See id.* (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)).

180. *See id.* at 371 (citing the Illinois Supreme Court’s findings in *People v. Allen*, 481 N.E.2d 690, 697 (Ill. 1985)).

181. *Id.* at 373.

182. *Id.* at 376 (Stevens, J., dissenting) (citing U.S. CONST. amend. V).

183. *Id.* at 377 (Stevens, J., dissenting).

184. *See id.* (Stevens, J., dissenting) (discussing the same Illinois statute in *United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931 (7th Cir. 1975)).

185. *See id.* at 378-79 (Stevens, J., dissenting).

186. *See id.* (Stevens, J., dissenting).

is a criminal proceeding for the purposes of the Fifth Amendment.¹⁸⁷

D. *The Kansas Sexually Violent Predators Act*

In 1994, Kansas enacted the Sexually Violent Predators Act (the "Act"), which was designed to allow the state to involuntarily civilly commit sexually dangerous predators.¹⁸⁸ The purpose of the Act was to provide "long-term" treatment to "sexually violent predators" outside of the prison setting that the legislature determined to be generally "poor" for providing such treatment.¹⁸⁹

The Act defined a "Sexually Violent Predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."¹⁹⁰ A "mental abnormality" is defined as "any congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of

187. *See id.* at 379 (Stevens, J., dissenting).

188. KAN. STAT. ANN. § 59-29a01 (1994). In its findings the Kansas legislature stated:

[A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 et seq. and amendments thereto, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long-term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in (citation omitted) therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature.

Id. § 59-29a01.

189. *Id.*

190. *Id.* § 59-29a02(a) (1994 & Supp. 1997), amended by 1998 Kan. Sess. Laws 198.

others.”¹⁹¹

Civil commitments for sexually violent predators are initiated when an agency with proper jurisdiction provides ninety-day written notice to the Attorney General¹⁹² that someone who has been previously convicted of a “sexually violent” offense and may meet the criteria of a sexually violent predator¹⁹³ is expected to be released from confinement.¹⁹⁴ The Attorney General is also to be notified in writing ninety days prior to the release of a person who was charged with a sexually violent offense but was declared incompetent to stand trial¹⁹⁵ or was found not guilty by reason of insanity.¹⁹⁶ When reporting the upcoming release of an individual who may be subject to involuntary commitment, the releasing agency is required to provide the attorney general with that person’s name, identifying factors, anticipated place of residence upon release, offense history,¹⁹⁷ and documentation of the person’s institutional adjustment and any treatment received.¹⁹⁸ At this point, a review committee appointed by the Attorney General¹⁹⁹ and a separate review committee appointed by the Secretary of Corrections²⁰⁰ individually assess the data to determine whether the person is a sexually violent predator.²⁰¹

If the Attorney General’s committee concludes that the person is a sexually violent predator, then the attorney general may file a petition within seventy-five days from the date of the original written notice alleging that the person is a sexually violent predator.²⁰² This petition

191. *Id.* § 59-29a02(b) (1994 & Supp. 1997), amended by 1998 Kan. Sess. Laws 198.

192. *See id.* § 59-29a03(a) (1994 & Supp. 1997). An agency with jurisdiction is defined as “that agency which releases upon lawful order or authority a person serving a sentence or term of confinement and includes the department of corrections, the department of social and rehabilitation services and the Kansas parole board.” *Id.* § 59-29a02(f) (1994 & Supp. 1997), amended by 1998 Kan. Sess. Laws 198.

193. *See id.* § 59-29a02(a) (Supp. 1997) (amending KAN. STAT. ANN. § 59-29a02(a) (1994)).

194. *See id.* § 59-29a03(a)(1) (1994 & Supp. 1997).

195. *See id.* § 59-29a03(a)(2).

196. *See id.* § 59-29a03(a)(3).

197. *See id.* § 59-29a03(b)(1).

198. *See id.* § 59-29a03(b)(2).

199. *See id.* § 59-29a03(e) (Supp. 1997).

200. *See id.* § 59-29a03(d). The recommendation made by this committee is an assessment and is not determinative in how the attorney general’s committee assesses the data. *See id.* § 59-29a03(e).

201. *See id.* § 59-29a03(e).

202. *See id.* § 59-29a04 (Supp. 1997) (amending KAN. STAT. ANN. § 59-29a04 (1994) (increasing the time to file the petition from forty-five to seventy-five days)).

must contain sufficient facts to support such allegation.²⁰³ If there are sufficient facts to show probable cause,²⁰⁴ then a trial is initiated to determine if the person is a sexually violent predator who should be committed.²⁰⁵ The trial provides the criminal law protections of a jury trial, free counsel for indigent defendant, and the right to call and cross-examine witnesses.²⁰⁶ The trier of fact must find beyond a reasonable doubt that the defendant is a sexually violent predator.²⁰⁷

Once committed, the “predator” is placed in the custody of the Secretary of Social and Rehabilitation Services in a secure facility for “control, care and treatment until such time as the person’s abnormality or personality disorder has so changed that the person is safe to be at large.”²⁰⁸ The committed person is entitled to a yearly review of his mental condition.²⁰⁹ At that time, the court conducts a hearing to determine whether probable cause exists “to believe the person’s mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged.”²¹⁰ If probable cause is found, then the court initiates a proceeding with the same procedural protections granted during the initial commitment proceedings.²¹¹ The state then has the burden to prove beyond a reasonable doubt that the person’s mental disorder remains such that the person is unstable and “if released is likely to engage in acts of sexual violence.”²¹²

III. DISCUSSION

A. *Facts of the Case*

In 1984, Leroy Hendricks pled guilty to two counts of taking indecent liberties with a child.²¹³ At the time of his guilty plea, Mr.

203. *See id.*

204. *See id.* § 59-29a05 (Supp. 1997) (amending KAN. STAT. ANN. § 59-29a05 (1994)). The statute also permits the defendant to retain medical experts on his behalf and provides a medical examination free if the defendant is indigent. *See id.*

205. *See id.* § 59-29a06 (Supp. 1997) (amending KAN. STAT. ANN. § 59-29a06 (1994) (increasing the time for initiating trial from forty-five to sixty days after probable cause hearing)).

206. *See id.*

207. *See id.* § 59-29a07 (Supp. 1997).

208. *Id.*

209. *See id.* § 59-29a08 (1994 & Supp. 1997), *amended by* 1998 Kan. Sess. Laws 198.

210. *Id.*

211. *See id.*

212. *Id.*

213. *See In re Hendricks*, 912 P.2d 129, 130 (Kan. 1996), *rev'd sub nom.* *Kansas v.*

Hendricks had a history of taking indecent liberties with children that spanned thirty years.²¹⁴ In November of 1984, Mr. Hendricks was sentenced to five to twenty years under two counts of taking indecent liberties with a child.²¹⁵ Pursuant to a plea agreement, the State dismissed a third count of indecent liberties and refrained from requesting imposition of the Habitual Criminal Act.²¹⁶ While Mr. Hendricks was imprisoned, Don Gideon killed Stephanie Schmidt, the murder that was the impetus to the Sexually Violent Predators Act.²¹⁷ Mr. Hendricks's sentence was to expire in 1994,²¹⁸ but the State sought to make Hendricks the first person committed under its new SVPA.²¹⁹ In his commitment hearing, a jury found beyond a reasonable doubt that Mr. Hendricks was a sexually violent predator.²²⁰ Mr. Hendricks challenged the constitutionality of his commitment on the grounds that his commitment proceeding did not afford him due process of law,²²¹ that the SVPA was an ex post facto law,²²² and that the commitment violated his double jeopardy rights under the Fifth Amendment.²²³

Hendricks, 521 U.S. 346 (1997).

214. *See id.* at 131. Mr. Hendricks's other offenses included exposing himself to two girls in 1955, which resulted in a fine of \$2.90; playing strip poker with a girl who was 14 in 1958; molesting two boys he met while working in a carnival in 1960; and further abuses of children in 1963, 1967 and 1978. *See* Brief for Respondent at *132a, *133a, *136a, *139a-*166a, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075) (1996 WL 528985).

215. *See In re Hendricks*, 912 P.2d at 130.

216. *Id.* (referencing KAN. STAT. ANN. § 21-4504 which would have allowed the trial court judge to sentence Hendricks to a 40-year prison sentence, effectively confining Hendricks for the rest of his life).

217. *See supra* text accompanying notes 2-5.

218. *See In re Hendricks*, 912 P.2d at 130.

219. *See id.*

220. *See id.* at 131. Sexually violent predator is defined as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility." KAN. STAT. ANN. § 59-29a02(a) (1994 & Supp. 1997), *amended by* 1998 Kan. Sess. Laws 198.

221. *See In re Hendricks*, 912 P.2d at 133; *see also* U.S. CONST. amend. XIV, § 2.

222. *See In re Hendricks*, 912 P.2d at 133; *see also* U.S. CONST. art. I §9 cl. 3.

223. *See In re Hendricks*, 912 P.2d at 133; *see also* U.S. CONST. amend. V.

B. *The Supreme Court of Kansas Decision*

1. The Kansas Supreme Court's Majority Opinion

In finding the Kansas Sexually Violent Predators Act unconstitutional,²²⁴ the Kansas Supreme Court looked primarily at substantial due process considerations.²²⁵ The court went into a lengthy discussion of how other courts including the United States Supreme Court have interpreted the terms "mental abnormality," "mental illness," and "mental disorder."²²⁶ The Kansas Supreme Court determined that "mental abnormality" is not the equivalent of "mental illness."²²⁷ Thus, to interpret the two similarly would allow anyone who has been convicted of a sexually violent crime to be diagnosed as "mentally abnormal" and involuntarily committed.²²⁸

According to the testimony of the State's psychologist, pedophilia constitutes a "mental abnormality" within the mental health community, but it is not a diagnosis.²²⁹ Rather, pedophilia describes an abnormality or a deviance from social norms.²³⁰ Because "mental abnormality" is not a formally recognized diagnosis, the court considered this term as it is defined in the SVPA.²³¹ The State's psychologist further testified that the legal definition is circular "in that certain behavior defines the condition that is used to predict the behavior."²³² The court ruled that a "mental abnormality" is not a

224. See *In re Hendricks*, 912 P.2d at 138.

225. See *id.* The Constitution states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

226. See *In re Hendricks*, 912 P.2d at 134-35. The court paid particular attention to the Washington Supreme Court and its interpretation of Washington's sexual predator statute, because Kansas's SVPA was based in large part on the Washington statute. See *id.* at 135 (discussing *Personal Restraint of Young*, 857 P.2d 989 (1993)). The Kansas court also analyzed the United States Supreme Court holding in *Foucha v. Louisiana* which required that involuntarily committed persons be both "mentally ill" and dangerous. See *id.* at 134-35 (discussing *Foucha v. Louisiana*, 504 U.S. 71, 78 (1992)).

227. See *id.* at 135.

228. See *id.* at 136.

229. See *id.* at 137.

230. See *id.*

231. See *id.* at 137-38. The court referred to KAN. STAT. ANN. § 59-29a02(b), stating: "Mental abnormality means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." *Id.* at 138 (citing KAN. STAT. ANN. § 59-29a02(b) (1994 & Supp. 1997)).

232. *Id.* at 137-38. The circularity argument the court put forth was that the mental abnormality was based upon a person's likelihood of committing future acts of sexual violence, but the likelihood of committing future acts of sexual violence was based on whether or not the person had been convicted of a previous act of sexual violence. See *id.*

“mental illness.”²³³ Therefore, based upon the United States Supreme Court’s decision in *Foucha v. Louisiana*, which requires involuntarily committed persons be both mentally ill and dangerous, the Kansas Supreme Court concluded that the “mental illness” prong was not satisfied and Hendricks could not constitutionally be involuntarily committed.²³⁴

Furthermore, the court found that “the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public.”²³⁵ The court determined that, in actuality, little treatment is provided for sexually violent predators under the statute’s provisions.²³⁶ The Kansas Supreme Court also regarded this further incarceration of Mr. Hendricks as an attempt by the State to rectify its unreasonably low sentence of ten years for a repeat pedophile.²³⁷ As such, the primary objective of the Act is to “continue incarceration and not to provide treatment.”²³⁸

2. The Dissenting Opinion of the Kansas Supreme Court

Justice Larson’s dissent criticized the majority’s due process analysis because it did not address directly what test should be used to render the Sexually Violent Predators Act unconstitutional.²³⁹ Justice Larson stated that a two-tiered analysis must be applied to an act which purportedly violates due process.²⁴⁰ The first step is to determine whether a fundamental right is involved.²⁴¹ A fundamental right is involved when a case involves “suspect classifications such as race, ancestry, and alienage, and fundamental rights expressly or implicitly guaranteed by the Constitution.”²⁴² The next step is the application of the appropriate test.²⁴³ When a fundamental right, such as the loss of

233. *See id.* at 138.

234. *See id.* at 138; *see also* *Foucha v. Louisiana*, 504 U.S. 71, 78 (1992).

235. *In re Hendricks*, 912 P.2d at 136.

236. *See id.*

237. *See id.* at 137.

238. *Id.* at 136. In a concurring opinion, Justice Lockett stated that the defendant could have served the rest of his life in prison, but was sentenced to 5 to 20 years and served that sentence. *See id.* at 139 (Lockett, J., concurring). To commit him now would be violative of the Constitution, because this was a second punishment. *See id.* (Lockett, J., concurring).

239. *See id.* at 144 (Larson, J., dissenting).

240. *See id.* at 145 (Larson, J., dissenting).

241. *See id.* (Larson, J., dissenting).

242. *Id.* (Larson, J., dissenting) (quoting *Farley v. Engelken*, 740 P.2d 1058 (Kan. 1987)).

243. *See id.* (Larson, J., dissenting).

liberty, is at stake a strict scrutiny test must be applied.²⁴⁴ Under strict scrutiny, the state must show a compelling state interest for its action, and that the state action was narrowly tailored to meet the compelling state interest.²⁴⁵ Moreover, the presumption of constitutionality is greatly diminished when a statute involves a fundamental right.²⁴⁶ Justice Larson recognized that there was clearly a fundamental right at issue in the present case,²⁴⁷ but the Justice maintained that the State met its burden of showing a compelling interest in acting as it did and that the action it took was narrowly tailored to serve that end.²⁴⁸ Justice Larson found that the Act was narrowly tailored because of its requirement of finding proof beyond a reasonable doubt before any commitment may occur.²⁴⁹ The use of the highest burden of proof demonstrates that the State sought an exceptionally limited application of the Act.²⁵⁰

The dissent continued its attack on the majority's opinion by distinguishing *Foucha v. Louisiana*²⁵¹ from the present case.²⁵² The statute under consideration in *Foucha* was ruled unconstitutional because it allowed for the indefinite commitment of a person solely because he was dangerous, and not because he was dangerous and mentally ill.²⁵³ The Kansas statute required, however, that the committed person be released as soon as he demonstrated that he no longer suffered from a "mental abnormality."²⁵⁴ The dissent went on to address Hendricks's other charges against the Act, such as his claim that the Act violated his double jeopardy rights.²⁵⁵ Since the dissent

244. *See id.* (Larson, J., dissenting).

245. *See id.* (Larson, J., dissenting).

246. *See id.* (Larson, J., dissenting).

247. *See id.* (Larson, J., dissenting).

248. *See id.* at 145-46 (Larson, J., dissenting).

249. *See id.* at 146 (Larson, J., dissenting); *see also supra* text accompanying notes 172-190.

250. *See In re Hendricks*, 912 P.2d at 146. In support of the position that the SVPA is to be very narrowly applied, the dissent pointed to *Addington v. Texas*, 441 U.S. 418 (1979), which held that clear and convincing proof is sufficient to involuntarily commit a person. *See id.* (discussing *Addington v. Texas*, 441 U.S. 418, 429 (1979)). The *Addington* court reasoned that to require proof beyond a reasonable doubt would create an almost insurmountable barrier to committing those who are mentally ill and dangerous. *See Addington*, 441 U.S. at 429.

251. 504 U.S. 71 (1992).

252. *See In re Hendricks*, 912 P.2d at 147 (Larson, J., dissenting) (distinguishing *Foucha v. Louisiana*, 504 U.S. at 80).

253. *See Foucha*, 504 U.S. at 80.

254. *See In re Hendricks*, 912 P.2d at 147 (referring to KAN. STAT. ANN. § 59-29a08).

255. *See id.* at 150-55 (Larson, J., dissenting).

considered the commitment proceedings to be civil and not criminal,²⁵⁶ Hendricks would have to show that the civil commitment, although technically a civil sanction, was so punitive so as to constitute punishment.²⁵⁷ The dissent determined that the commitment did not constitute punishment under this standard either.²⁵⁸ Finally, the dissent rejected Hendricks's ex post facto claim.²⁵⁹ An ex post facto claim requires the infliction of a criminal penalty for an act that was innocent when performed.²⁶⁰ Since the dissent did not regard the commitment of Leroy Hendricks to be a criminal penalty, there could be no violation of the ex post facto provisions of the Constitution.²⁶¹

C. *The United States Supreme Court Decision*

In *Kansas v. Hendricks*,²⁶² the United States Supreme Court faced the same issues that the Kansas Supreme Court faced, namely whether Kansas's Sexually Violent Predators Act violated substantive due process,²⁶³ whether it violated the Double Jeopardy provisions of the Fifth Amendment²⁶⁴ and whether it was an ex post facto law.²⁶⁵ Speaking for the Court, Justice Thomas rejected these three claims and found the Act constitutional.²⁶⁶

1. The Majority Opinion

Justice Thomas' majority opinion regarded the term "mental abnormality" as substantively synonymous with "mental illness."²⁶⁷ Therefore, the Kansas Supreme Court erred in determining that this due process requirement for civil commitments had not been met.²⁶⁸

256. *See id.* at 151-53 (Larson, J., dissenting). The majority did not delve into Hendricks's other claims since it found the act unconstitutional based upon the due process claims. *See id.* at 138; *see also supra* text accompanying notes 219-238.

257. *See In re Hendricks*, 912 P.2d at 154 (Larson, J., dissenting) (discussing *United States v. Halper*, 490 U.S. 435, 447-48 (1989)); *see also supra* text accompanying notes 113-140.

258. *See id.* (Larson, J., dissenting).

259. *See id.* (Larson, J., dissenting).

260. *See id.* at 154 (Larson, J., dissenting); U.S. CONST. art. I, §9, cl. 3.

261. *See In re Hendricks*, 912 P.2d at 154 (Larson, J., dissenting).

262. 117 S. Ct. 2072 (1997), *rev'g In re Hendricks*, 912 P.2d 129 (Kan. 1996).

263. *See id.* at 2079.

264. *See id.* at 2081.

265. *See id.*

266. *See id.* at 2086.

267. *See id.* at 2080-81.

268. *See id.* at 2080. Justice Thomas referred to other cases in which the Court has accepted varied legal terms defining "mental illness" for the basis of civil commitments. *See id.* at 2080-81 (citing *Addington v. Texas*, 441 U.S. 418, 425-26 (1979) (using the terms "emotionally disturbed" and "mentally ill."); *Jackson v. Indiana*, 406 U.S. 715,

Although the term “mental abnormality” is not a medical diagnosis, the majority found that the legal definition sufficiently considered issues such as individual responsibility and competency.²⁶⁹ Justice Thomas further declared, in a manner consistent with the dissent in the Kansas Supreme Court, that the Act was not punitive.²⁷⁰ As such, it could not violate either the Double Jeopardy protections granted under the Fifth Amendment or the prohibition against ex post facto laws.²⁷¹

The majority elaborated by noting that the Kansas Act expressly required the proceedings to be civil.²⁷² As a result, the defendant must provide “the clearest proof” that the purpose or effect of the statutory scheme is “so punitive” as to negate the state’s intention.²⁷³ Hendricks argued that the use of criminal procedure aspects in the civil commitment hearing, including a trial by jury, proof beyond a reasonable doubt, cross examination of witnesses, the right to an attorney if the defendant is indigent, and the state’s role serving as prosecutor, demonstrated that the statute’s purpose was punitive.²⁷⁴ The majority rejected the argument that these procedural protections necessarily changed the nature of the proceedings from civil to criminal.²⁷⁵ Instead, Justice Thomas concluded that the State chose to implement these measures in order to ensure greater fairness, and that these protections were insufficient to render Mr. Hendricks’s commitment hearing a criminal proceeding.²⁷⁶

Hendricks also argued that, even though required by the statute,²⁷⁷

732 (1972) (holding acceptable the terms “incompetency” and “insanity”); *Foucha v. Louisiana*, 504 U.S. 71, 88 (1992) (O’Connor, J., concurring in part and concurring in judgment) (recognizing the State’s authority to commit a person when a “medical justification for doing so” exists).

269. See *Hendricks*, 117 S. Ct. at 2081; see also Jules B. Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 RUTGERS L. REV. 377, 391-94 (1987) (comparing the legal and medical professions purposes in recognizing mental illness).

270. See *Hendricks*, 117 S. Ct. at 2082-85.

271. See *id.* at 2081; see also *In re Hendricks*, 912 P.2d at 151-52 (Larson, J., dissenting). See generally *supra* text accompanying notes 252-257.

272. See *Hendricks*, 117 S. Ct. at 2082 (citing KAN. STAT. ANN. § 59-29a01 (1994)). Sexually violent predators should undergo “a civil commitment procedure for [their] long term care and treatment.” *Id.*

273. See *Hendricks*, 117 S. Ct. at 2082; see also *supra* text accompanying notes 101-113.

274. See *Hendricks*, 117 S. Ct. at 2083 (referencing KAN. STAT. ANN. §§ 59-29a06, 59-29a07); see also *supra* Part II and text accompanying notes 182-86.

275. See *Hendricks*, 117 S. Ct. at 2083.

276. See *id.* at 2083; see also *Allen v. Illinois*, 478 U.S. 364, 370 (1986); *supra* Part II.C.5. (detailing the *Allen* decision and stating that the use of criminal proceeding protections in a civil commitment hearing does not *in and of itself* make the proceeding criminal) (emphasis added).

277. See *Hendricks*, 117 S. Ct. at 2084-85 (quoting KAN. STAT. ANN. §§ 59-29a01,

no legitimate treatment was provided.²⁷⁸ Without treatment the statute amounted to nothing more than further incarceration for his previous crimes.²⁷⁹ Justice Thomas countered by reading the Supreme Court of Kansas opinion to say that Hendricks's abnormality was untreatable.²⁸⁰ The majority held that even a lack of treatment alternatives did not undermine the legitimate civil goal of segregating sexually violent offenders from the rest of society.²⁸¹

The majority further addressed the civil nature of the sanction and noted that the SVPA is not punitive because it does not serve either of the purposes of punishment, namely retribution or deterrence.²⁸² The lack of a scienter requirement for involuntary commitment under the Act provided further evidence of the civil purpose of the statute.²⁸³ The majority opinion went on to state that the use of an historically punitive restraint failed to change the nature of the proceeding in the Court's opinion because the commitment of sexually violent predators serves a legitimate, non-punitive purpose.²⁸⁴ The Court further rejected Hendricks's argument that the potentially indefinite nature of the confinement demonstrated the state's punitive intent.²⁸⁵ The Court did not consider the commitment indefinite because the statutory provisions allow for immediate release when a sexually violent predator shows that he is "safe to be at large."²⁸⁶

In considering Hendricks's Double Jeopardy claim, the majority stated that the issue of multiple criminal trials for the same conduct did not apply because the proceedings were civil in nature.²⁸⁷ In addition, the Court did not regard the commitment as a punishment.²⁸⁸ Therefore, Hendricks could not succeed on any arguments concerning violations of the prohibition against multiple punishments.²⁸⁹ Accordingly, the Court rejected the respondent's ex post facto claims

59-29a07(a), 59-29a09).

278. *See id.* at 2083.

279. *See id.* at 2083-84 (referring to the findings of the Kansas Supreme Court which stated that treatment is "all but nonexistent"); *see also supra* text accompanying notes 224-238 (discussing the Supreme Court's findings).

280. *See Hendricks*, 117 S. Ct. at 2084.

281. *See id.*

282. *See id.* at 2082-83.

283. *See id.* (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)).

284. *See id.* at 2083.

285. *See id.*

286. *See id.* (citing KAN. STAT. ANN. §59-29a07).

287. *See id.* at 2086.

288. *See id.*

289. *See id.*

because there was no punitive measure imposed on Mr. Hendricks.²⁹⁰

2. Justice Kennedy's Concurring Opinion

Although Justice Kennedy joined in the majority opinion, he also submitted a brief opinion "to caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process."²⁹¹ Justice Kennedy agreed with the judgment of the Court, but warned that the civil system may not be used to impose punishment after the State makes an improvident plea bargain on the criminal side.²⁹² If in future cases, the term "mental abnormality is too imprecise a category" to provide a solid basis for civil commitment, then the term should be struck down.²⁹³ For the time being, however, Justice Kennedy was satisfied that the Act was constitutional and did not impose a second punishment.²⁹⁴

3. Justice Breyer's Dissent

Justice Breyer began his dissent by stating that he agreed with the majority that the Kansas Supreme Court was in error for declaring that the term "mental abnormality" was substantially different than "mental illness" as far as due process rights are concerned.²⁹⁵ The dissent disagreed with the majority's determination that the Sexually Violent Predators Act was not punitive.²⁹⁶

Justice Breyer pointed out the obvious similarities between the civil commitment of sexually violent predators under the Kansas Act and traditional criminal punishment.²⁹⁷ The resemblances included the state's use of "secure" confinement and the fact that this incarceration was against the will of the patient.²⁹⁸ Moreover, the commitment's basic objective of preventing sexually violent predators from committing future predatory acts through incarceration fulfilled one of

290. *See id.*

291. *Id.* at 2087 (Kennedy, J., concurring).

292. *See id.* (Kennedy, J., concurring).

293. *Id.* (Kennedy, J., concurring).

294. *See id.* (Kennedy, J., concurring).

295. *See id.* at 2087-88 (Breyer, J., dissenting). Justice Breyer's dissent was joined in full by Justices Stevens and Souter and joined in parts II and III (those parts not dealing with the due process considerations) by Justice Ginsburg. *See id.* at 2087 (Breyer, J., dissenting). Justice Ginsburg did not, however, provide a separate opinion regarding whether the term "mental abnormality" met the due process requirements of the Fourteenth Amendment. *See id.* (Breyer, J., dissenting).

296. *See id.* at 2090 (Breyer, J., dissenting).

297. *See id.* at 2090-91 (Breyer, J., dissenting).

298. *See id.* at 2090 (Breyer, J., dissenting) (citing KAN. STAT. ANN. § 59-29a07(a) (1994)).

the most basic objectives of criminal law, namely incapacitating an individual and preventing him from committing “future mischief.”²⁹⁹

A more in-depth analysis of the SVPA showed further punitive intent by the Kansas legislature.³⁰⁰ For example, the Act’s prohibitory or penal intent is obvious because the commitment sanctions, like criminal punishment, are imposed only upon individuals who have previously committed a criminal offense.³⁰¹ Additionally, the use of a criminal prosecutor and the use of criminal law procedures further demonstrate indications of penal intent.³⁰² Justice Breyer conceded that these procedural aspects in and of themselves would not be enough to render the Act unconstitutional, but when taken together with other aspects of the Act, the punitive intent becomes much clearer.³⁰³

The dissent also distinguished the present case from *Allen v. Illinois*.³⁰⁴ In *Allen*, the Court upheld the commitment of sexually violent predators.³⁰⁵ According to the dissenting Justices, if the majority had applied the same factors considered in *Allen*, then it would have reached the exact opposite conclusion.³⁰⁶ Here, the Kansas Supreme Court, unlike the Illinois Supreme Court in *Allen*, determined that the primary purpose of the SVPA was to punish, not

299. *See id.* at 2090-91 (Breyer, J., dissenting) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *11-*12 (describing an objective of criminal law as “depriving the party injuring of the power to do future mischief”); 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.5, p.32 (1986); UNITED STATES SENTENCING GUIDELINES MANUAL ch.1, pt. A (Nov. 1995)).

300. *See id.* at 2091 (Breyer, J., dissenting).

301. *See id.* (Breyer, J., dissenting) (citing KAN. STAT. ANN. §§ 59-29a02(a) and 59-29a03(a) (1994)).

302. *See id.* (Breyer, J., dissenting) (referencing KAN. STAT. ANN. §§ 59-29a06, 59-29a07 (1994)).

303. *See id.* at 2091-92 (Breyer, J., dissenting).

304. *See id.* (Breyer, J., dissenting).

305. *See id.* at 2092 (Breyer, J., dissenting); *Allen v. Illinois*, 478 U.S. 364 (1986); *see also supra* notes 172-87 and accompanying text.

306. *See id.* at 2092-97 (Breyer, J., dissenting). Specifically, Justice Breyer contrasted *Hendricks* from *Allen*, because in *Hendricks* the state supreme court interpreted the SVPA as primarily instilling punishment, whereas in *Allen*, the majority was swayed because the Illinois Supreme Court had determined the primary purpose of its state’s SVPA was providing treatment. *See id.* at 2092 (Breyer, J., dissenting). Additionally, the Kansas statute, unlike its Illinois counterpart, provides “treatment” only after the defendant had served his prison sentence. *See id.* at 2093 (Breyer, J., dissenting). Next, unlike the law in Illinois, the SVPA adopted in Kansas did not require the committing authority to consider using less restrictive alternatives to commitment. *See id.* at 2094 (Breyer, J., dissenting). Furthermore, Kansas, unlike the 16 other states which have Sexually Violent Predators Acts, requires the delay of treatment, prohibits consideration of less restrictive alternatives and applies retroactively. *See id.* at 2095 (Breyer, J., dissenting).

to provide treatment.³⁰⁷ Unlike the Illinois law under consideration in *Allen*, Kansas's Sexually Violent Predator Act did not provide treatment to those committed.³⁰⁸ The Court upheld the Illinois law in *Allen v. Illinois*, precisely because it provided treatment in lieu of prison to those committed under it.³⁰⁹ Contrary to the view of the majority, the dissent read the record as indicating that the State of Kansas was not providing treatment to Mr. Hendricks, as is required under the SVPA, because of a lack of funding or planning on the part of the state, not because Mr. Hendricks was unamenable to treatment.³¹⁰ The state's failure to provide treatment, coupled with statements from the Act's official supporters that the Act provided an opportunity to permanently confine sexually violent predators further, led Justice Breyer to regard the intent of the legislation to be punitive.³¹¹

Moreover, if the state legislators truly desired treatment for these "predators," the dissent questioned why legislators would delay treatment for the prisoners until years after the criminal act which necessitated the treatment was committed.³¹² The Court inferred that this delay would only hinder the success of any imposed treatment.³¹³ In addition, methods less restrictive than commitment to a hospital existed to provide treatment for a sexual offender.³¹⁴ When legislators failed to consider, or to use, "alternative and less harsh methods" to accomplish a legitimate, nonpunitive objective, then a punitive purpose in the resulting law can be shown.³¹⁵

Justice Breyer continued his attack on the Kansas legislation by

307. *See id.* at 2090 (Breyer, J., dissenting).

308. *See id.* at 2092 (Breyer, J., dissenting) (citing *Allen v. Illinois*, 478 U.S. at 369 (considering Ill. Rev. Stat., ch. 38 ¶ 105-08 (1985))).

309. *See Allen*, 478 U.S. at 373.

310. *See Hendricks*, 117 S. Ct. at 2093 (Breyer, J., dissenting).

311. *See id.* (Breyer, J., dissenting) (citing *State Habeas Corpus Proceeding*, App.393 at 468).

312. *See id.* at 2093 (citing Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597, 617 (1992) (stating that a delay in treatment causes the offender to lose his memory regarding the offense, thus making it more difficult for the offender to accept responsibility while, at the same time, creating the opportunity for the offender to create a hardened and distorted view of his crime)).

313. *See id.* (Breyer, J., dissenting).

314. *See id.* at 2095 (Breyer, J., dissenting) (citing Ingo Keilitz et al., *Least Restrictive Treatment of Involuntary Patients: Translating Concepts into Practice*, 29 ST. LOUIS U. L. J. 691, 693 (1985)).

315. *See id.* (Breyer, J., dissenting) (citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)).

comparing it to other sexually violent predator statutes.³¹⁶ Of the seventeen states that have sexually violent predator laws, only Kansas's statute delays treatment, fails to consider less restrictive alternatives, and applies to pre-crime acts.³¹⁷ The dissent emphasized that merely being the most restrictive of all of the Sexually Violent Predator Acts does not make the Kansas act punitive *per se*, but its harsh restrictiveness along with the considerations discussed above make the punitive intent clear.³¹⁸

The dissenters found that there was "clear and objective evidence" to show that the intent of the Kansas legislation was to punish.³¹⁹ The dissent further found that all of the *Kennedy v. Mendoza-Martinez* factors are applicable to the Sexually Violent Predators Act, because the Act: (1) applies an affirmative restraint; (2) uses a restraint which has historically been regarded as punishment; (3 & 4) is imposed upon behavior already a crime once scienter is found; (5) serves both of the traditional aims of punishment, namely, deterrence and retribution; (6) does not primarily serve an alternative purpose such as treatment; and (7) is excessive in relation to any alternative purpose assigned.³²⁰ Based upon the satisfaction of all of the *Mendoza-Martinez* factors, and because the SVPA, in the context of this litigation, clearly showed the legislature's punitive intent, four justices of the court concluded that Mr. Hendricks's Fifth Amendment protections against double jeopardy had been violated.³²¹ The Justices in the dissent concluded that Kansas's failure to provide treatment, failure to provide less restrictive methods of treatment, delay of treatment, and satisfaction of all of the *Kennedy v. Mendoza-Martinez* factors transformed the purported "civil" commitment into criminal punishment, thereby

316. *See id.* at 2095-99 (Breyer, J., dissenting) (reviewing the following statutes: ARIZ. REV. STAT. ANN. § 13-4601 *et seq.* (Supp. 1996-1997); CAL. WELF. & INST. CODE ANN. § 6600 *et seq.* (West Supp. 1997); COLO. REV. STAT. § 16-11.7-101 *et seq.* (Supp. 1996); CONN. GEN. STAT. § 17a-556 *et seq.* (1992 and Supp. 1996); 725 ILCS § 205 *et seq.* (1994); IOWA CODE ANN. ch. 709c (Supp. 1996); KAN. STAT. ANN. § 59-29a01 *et seq.* (1994); MASS. GEN. LAWS, ch. 123A (Supp. 1997); MINN. STAT. ANN., ch. 253B (1994 and Supp. 1996-1997); NEB. REV. STAT. § 29-2923 *et seq.* (Supp. 1996); N.J. STAT. ANN. 30:4-82.4 *et seq.* (West 1997); N.M. STAT. ANN. § 43-1-1 *et seq.* (1993); ORE. STAT. § 426.510 *et seq.* (1995); TENN. CODE ANN. § 33-6-301 *et seq.* (1984 and Supp. 1996); UTAH CODE ANN. § 77-16-1 *et seq.* (1995); WASH. REV. CODE ANN. § 71.09.01 *et seq.* (1992 and Supp. 1996-1997) and WIS. STAT. § 980.01 *et seq.* (1996)).

317. *See id.* at 2099 app. A.

318. *See id.* at 2095 (Breyer, J., dissenting).

319. *See id.* at 2098 (Breyer, J., dissenting); *see also* United States v. Ward 448 U.S. 242, 249 (1980); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

320. *See Hendricks*, 117 S. Ct. at 2098 (Breyer, J., dissenting) (applying *Kennedy*, 372 U.S. at 169).

321. *See id.* (Breyer, J., dissenting).

violating the Double Jeopardy Clause.³²²

IV. ANALYSIS

In holding the Kansas Sexually Violent Predators Act of 1994 constitutional, the majority considered the purpose, effect and procedures that accompanied the act in isolation of one another. However, the majority failed to recognize that the Act, considered in its entirety, is clearly punitive in nature. In concluding that Kansas's regime of committing "sexually violent predators" for "very long" terms does not constitute punishment, the majority misinterprets the "clearest proof" standard which has been applied in previous cases and also ignores fundamental notions of what constitutes the core of punishment, namely moral blame.

A. *The Majority Improperly Applied "The Clearest Proof" of Punitive Nature Standard*

The majority correctly begins its analysis of whether the Kansas statute is punitive or civil in nature by looking to the express or implied intent of the statute.³²³ The statute expressly states that involuntary commitments are "civil" in nature.³²⁴ The majority properly observes that while this label is not dispositive, the statute will only be reversed if the defendant can show, with the "clearest proof," the punitive purpose or effect of the statute.³²⁵

Because the majority did not look to the legislative history of the statute for "objective manifestations" of the punitive purposes of the Act, it failed to properly interpret or apply the "clearest proof" standard.³²⁶ In *Kennedy v. Mendoza-Martinez*, house debates and letters from the Attorney General discussing the statute under inspection provided "inescapable" and objective proof of the penal intent of the statute.³²⁷ Had the majority looked at the same types of

322. *See id.* (Breyer, J., dissenting).

323. *See id.* at 2081-82; *supra* Part III.C.1; *see also* *United States v. Ward*, 448 U.S. 242, 248-49 (1980); *supra* Part II.C.2.

324. *See* KAN. STAT. ANN. § 59-29a01 (1994).

325. *See Hendricks*, 117 S. Ct. at 2082.

326. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *see also supra* text accompanying notes 89-99.

327. *See Kennedy*, 372 U.S. at 183. The Court termed the proof as "inescapable" proof in addressing the statute at issue in *Kennedy v. Mendoza-Martinez*. *See id.* Since the majority opinion cited *Fleming v. Nestor*, 363 U.S. 603, the case which articulated the term "clearest proof," it can reasonably be assumed that the "inescapable" proof cited exceeds the burden of "clearest proof." *See id.* at 164. To satisfy the proof needed to show the punitive intent of the statute, the Court looked at the legislative history of

evidence in *Hendricks*, then a different outcome would have been reached.

1. The Legislative History of the SVPA Clearly Shows the Act's Punitive Intent

When the SVPA of 1994 was under consideration by the Kansas General Assembly, the Attorney General for the State of Kansas heralded the Act as “the most significant preventive criminal justice legislation to be presented.”³²⁸ He stated further that the bill “will be preventative of criminal conduct *and not just punitive*.”³²⁹ The Attorney General also noted that “[this] law will keep dangerous sex offenders confined past their scheduled prison sentence. As I am convinced none of them should ever be released[.]”³³⁰ Carla Stovall, who, in 1994 was a member of the Parole Board in Kansas and presently serves as the Attorney General for the state, declared that the man who killed Stephanie Schmidt would “never have been released” had this law been in place only two years prior.³³¹ Under the standards used in *Kennedy v. Mendoza-Martinez*, the testimony of these two witnesses alone sufficiently and conclusively demonstrates the punitive purposes of the SVPA³³² and should have been considered by the majority in the present case.

Furthermore, the statements made by the Attorney General and Ms. Stovall clearly demonstrate the desire to impose just desserts for the wickedness of sexually violent predators.³³³ The proponents of this law, from the public to the former and present Attorneys General, all

the statute at issue as well as comments made by the Attorney General regarding the statute. *See id.* at 183. Specifically, the Court deemed a letter from the Attorney General to the Chair of the Senate Immigration Committee encouraging the adoption of the bill at issue in order to penalize those persons who evaded the draft during the Second World War as powerful, objective evidence of the purpose of the statute. *See id.* Justice Goldberg’s opinion stated that the legislative history of the statute at issue, along with the letter from the Attorney General, led to the “inescapable” conclusion that the statute was punitive. *See id.*

328. *Sexually Violent Predators Act, 1994: Hearings on S.B. 525 Before the Senate Judiciary Comm.*, Kan. Leg. (Feb. 22, 1994) (statement of Robert T. Stephan, Att’y. Gen. of the State of Kansas).

329. *See id.*

330. *Id.*

331. *Sexually Violent Predators Act, 1994: Hearings on S.B. 525 Before the Senate Judiciary Comm.*, Kan. Leg. (Feb. 22, 1994) (statement of Carla J. Stovall, former member of Parole Board who has since been appointed Attorney General of Kansas).

332. *See supra* Part III.B.

333. *See supra* Part II.B, and text accompanying notes 62-81 (discussing the philosophy of punishment).

regard this law as “criminal justice legislation”³³⁴ that would keep dangerous sex offenders incarcerated beyond their scheduled prison sentence because they should “never be released.”³³⁵

The majority also stated that the goals of punishment, namely deterrence and retribution, were not served by the Act under consideration.³³⁶ As the statements of Kansas’s last two attorneys general indicate, however, this law was designed to be retributive.³³⁷ Statements such as “these ‘animals’ should be kept in prison beyond their scheduled sentences and never allowed out” clearly indicate a retributive intent.³³⁸ Under its surface, this law was not intended to provide treatment, but aimed at further punishing people based upon their “bad” acts.

Furthermore, as the Court stated earlier in *Department of Revenue of Montana v. Kurth Ranch*, civil fines and forfeitures deter behaviors.³³⁹ In addition to glossing over the issue of deterrence, Justice Thomas’ opinion does not address retribution despite overwhelming evidence of the state’s retributive intent. The state’s punitive intent is clear because the record is replete with indications of retributive intent along with the indefinite nature of the commitment that is imposed as a deterrent.³⁴⁰

The people of Kansas, the Kansas Attorney General and the Kansas legislature all regarded this law as a means of keeping “animals” “behind bars” for a longer time than their sentences required.³⁴¹ To disguise the Sexually Violent Predators Act under the label of “civil” law is merely a route around the protections of the Fifth Amendment.³⁴²

2. The Majority Opinion is Inconsistent with Prior Court Decisions

The decision in *Hendricks* is inconsistent with the Court’s previous

334. *Sexually Violent Predators Act, 1994: Hearings on S.B. 525 Before the Senate Judiciary Comm.*, Kan. Leg. (Feb. 22, 1994) (statement of Robert T. Stephan, Att’y. Gen. of the State of Kansas); see also discussion *supra* Part I.

335. *Sexually Violent Predators Act, 1994: Hearings on S.B. 525 Before the Senate Judiciary Comm.*, Kan. Leg. (Feb. 22, 1994) (statement of Carla J. Stovall, former member of Parole Board who has since been appointed Attorney General of Kansas).

336. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997).

337. See *supra* notes 328, 331 and accompanying text.

338. See *id.*

339. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778 (1994).

340. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2082 (1997).

341. See discussion *supra* Parts I, IV.A.1.

342. See *Hendricks*, 117 S. Ct. at 2087-98 (5-4 decision) (Breyer, J., dissenting); see also discussion *supra* Part III.C.3.

decisions. Had the majority gone beyond its flippant remark that the Act does not seek to deter or carry out retribution, a careful consideration of how the sanctions operate under the Act would have revealed its punitive nature.³⁴³

Had the majority applied the *Mendoza-Martinez* factors, the only factors the Court has put forth for assessing what retribution is, it would have concluded that the indefinite commitment imposed on Leroy Hendricks was a “criminal punishment” and not a “civil sanction.” Clearly an involuntary commitment involves an “affirmative disability or restraint.”³⁴⁴ Furthermore, being confined and secured in a facility operated by the Department of Corrections has historically been regarded as a punishment.³⁴⁵ In addition, the fact that persons are committed based upon their prior convictions essentially provides for an extension of scienter running from the individual’s criminal trial to his civil commitment hearing.³⁴⁶ As discussed above, commitment is based upon the desire to instill “justice” on “animals” and to prevent those committed from committing future crimes.³⁴⁷ Accordingly, both of the traditional aims of punishment, retribution, and deterrence are served by the commitment.³⁴⁸ Also, commitment applies to behavior which is already a crime, hence the fifth *Mendoza-Martinez* factor is satisfied.³⁴⁹ Ostensibly, the purpose of the SVPA was to provide treatment, but the Supreme Court of Kansas found that no treatment was provided.³⁵⁰ Since no other purposes were put forth, it is clear that there are no “alternative purposes” for the SVPA other than to further punish criminals.³⁵¹ Finally, to the extent that treatment is a tenable alternative purpose, an indefinite confinement is excessive because treatments provided during a prisoner’s jail time, or treatment in a half-way house, would provide sexually violent predators with a less restrictive alternative.³⁵² While the state argued that the purpose of the commitment is to treat predators, the absence of any real treatment

343. See discussion *supra* Part III.C.1.

344. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

345. See *id.*; see also KAN. STAT. ANN. § 59-29a07 (1994 & Supp. 1997) (allowing for the Department of Corrections to assume the housing of those committed under the SVPA).

346. See *Kennedy*, 372 U.S. at 167-68.

347. See *id.* at 168-69.

348. See *id.*

349. See *id.*

350. See *In re Hendricks*, 912 P.2d 129, 131 (Kan. 1996), *rev'd sub nom.* *Kansas v. Hendricks*, 117 S. Ct. 2072, 2090 (1997).

351. See *Kennedy*, 372 U.S. at 167-68.

352. See *id.* at 168-69; *Hendricks*, 117 S. Ct. at 2090 (Breyer, J., concurring).

makes it clear that the majority should have been led to a different conclusion. Because the state's highest court acts as the ultimate interpreter of its own laws, the majority should not have dismissed the findings of the Kansas Supreme Court.

The majority also failed to give adequate consideration to the holding in *Allen v. Illinois*.³⁵³ Justice Thomas mentioned *Allen* only to state that the Court has upheld previous civil commitment laws which were provoked by prior criminal conduct.³⁵⁴ The Illinois statute in *Allen* was designed to provide treatment in lieu of prison sentences for sexually dangerous predators, not in addition to prison sentences.³⁵⁵ In *Allen*, there was no indication that the law was designed to keep sexually dangerous predators confined forever, nor was there any doubt that treatment was actually provided to those who were committed.³⁵⁶ The Court also stated that if treatment had not been provided, then the outcome "might well be different"³⁵⁷ As the Kansas Supreme Court and the dissent in *Hendricks* pointed out, there was no treatment provided.³⁵⁸ This is the exact scenario which prompted the *Allen* Court to envision creating a different outcome.³⁵⁹

B. The Majority Opinion Is Contrary to Fundamental Notions of What Constitutes Punishment

Applying only H. L. A. Hart's definition of punishment to the SVPA, one would conclude that civil commitment under the Act constitutes punishment. Confinement in a mental hospital deprives prisoners of liberty and subjects them to what one would normally consider "unpleasant" conditions.³⁶⁰ As the dissent pointed out and as the Attorneys General for Kansas would concede, the confinement comes about following an offense against legal rules.³⁶¹ The confinement of Leroy Hendricks was imposed on an actual offender for his previous offense³⁶² and was intentionally administered by human beings other than the offender.³⁶³ Finally, it was imposed and

353. *Hendricks*, 117 S. Ct. at 2082.

354. *See id.* (citing *Allen v. Illinois*, 478 U.S. 364, 373 (1986)).

355. *See Allen*, 478 U.S. at 370; *see also* discussion *supra* Part III.B.

356. *See Allen*, 478 U.S. at 370.

357. *See id.* at 373.

358. *See In re Hendricks*, 912 F.2d at 131; *Hendricks*, 117 S. Ct. at 2084 (Breyer, J., dissenting); *see also supra* notes 273-76 and accompanying text.

359. *See Allen*, 478 U.S. at 373.

360. *See supra* note 68 and accompanying text.

361. *See supra* Part III.C.

362. *See* discussion *supra* Part III.A.

363. *See* discussion *supra* Part III.A.

administered by the legal authority against whom the offense was committed.³⁶⁴ The additional factor of blame under Feinberg's and Lewis' definition of punishment is revealed in the overwhelming sense of blame contained in the testimony of the Schmidts and Attorneys General Stovall and Stephan.³⁶⁵

The plurality in *Kansas v. Hendricks* arrived at a decision that was inconsistent with the facts presented it, preceding cases, and common understandings of what constitutes punishment. The Court has often stated that the goals of punishment are deterrence and retribution, but it has not stated what constitutes punishment.³⁶⁶ The failure of the Court to adopt or to develop a consistent definition of punishment and punitive intent has allowed the State of Kansas to adopt a law which allows for multiple punishments under the guise of civil law.³⁶⁷

V. IMPACT

The Court's ruling in *Hendricks* has significantly eroded the protections guaranteed under the Fifth Amendment by lessening the standards states must apply in prosecuting criminals.³⁶⁸ Whenever a state concludes that it has arrived at an unfavorable plea bargain in the criminal process, it can lengthen the defendant's incarceration by involuntarily committing him in a civil proceeding.³⁶⁹ The Supreme Court's willingness to allow a state to inflict what is clearly a second punishment on a defendant,³⁷⁰ based upon political pressure and public animosity towards a notorious individual³⁷¹ after the defendant has served the majority of his sentence,³⁷² through a civil forum, corrupts the very reasons for having the Fifth and Sixth Amendments.³⁷³ While the criminal and civil law have experienced some interweaving of concepts, the *Hendricks* opinion strikes a severe blow to the very concept of punishment, one of few remaining divisions between the criminal and civil law.³⁷⁴

When a state incarcerates an individual to impose moral blame

364. See discussion *supra* Part III.A.

365. See *supra* notes 70-81 and accompanying text.

366. See *supra* Part II.C.

367. See *supra* Part II.D.

368. See *supra* Part II.C.

369. See *supra* Part III.A.

370. See *supra* Parts II.B., II.C.1-3.

371. See *supra* Parts I, III.A, IV.A.1.

372. See *supra* Part III.A.

373. See *supra* notes 82-87 and accompanying text.

374. See *supra* Part II.A.

because of his wicked acts and for being a “predator,” and not to treat the individual, the state punishes that individual.³⁷⁵ Leroy Hendricks committed wicked acts and was subject to spending the rest of his life in jail for the crimes he committed against children in 1984.³⁷⁶ Hendricks probably deserved to spend the rest of his life in prison, and the SVPA was passed so the state could continue to incarcerate the “animals” who commit wicked acts.³⁷⁷

C.S. Lewis stated that the link between justice and punishment is desert.³⁷⁸ Punishment in the form of incarceration is fair when it is deserved. It does not make sense to speak of a “just” treatment. Because Hendricks was not receiving treatment,³⁷⁹ was subject to an unpleasant experience,³⁸⁰ was the subject of “criminal justice,”³⁸¹ and was subject to further incarceration because he “deserved” it, he was in every sense of the word being punished.

The *Hendricks* holding now gives states the opportunity to pursue incarceration of the wicked, no matter what their wicked deed may have been, through civil proceedings that do not require the protections of criminal proceedings.³⁸² For example, suppose the state attempted to punish a defendant in a criminal court and the defendant was found not guilty. If it had a law like the one analyzed in *Hendricks*, the state could try the same defendant in a “civil proceeding” in order to “treat” that person.³⁸³ Regardless of which forum succeeds in incarcerating the defendant, the net result is still the same: the defendant loses his liberty,³⁸⁴ is removed from society,³⁸⁵ is stigmatized as a “sexually violent predator”;³⁸⁶ and is incarcerated for an indefinite term³⁸⁷ until either the state has succeeded in treating his “untreatable”³⁸⁸ disease or he has grown wise enough to appear cured.³⁸⁹

Because criminal proceedings require greater protections for

375. See *supra* Part II.B.

376. See *supra* Part III.A.

377. See *supra* Part II.D.

378. See *supra* notes 75-80 and accompanying text.

379. See *supra* Part IV.A.2.

380. See *supra* notes 65-68 and accompanying text.

381. See *supra* Part IV.A.1.

382. See *Hendricks*, 117 S. Ct. at 2074.

383. See *supra* Part III.B.1-C.3.

384. See *supra* Part II.D.

385. See *supra* Part II.D.

386. See *supra* Part II.D.

387. See *supra* Part II.D.

388. See *supra* Part II.D.

389. See *supra* notes 205-09 and accompanying text.

defendants than do civil proceedings, it is likely that state legislators, under pressure from inflamed citizens, will paradoxically turn to civil proceedings to incarcerate “animals” and “predators” in order to prove to voters that they are tough on crime.³⁹⁰

VI. CONCLUSION

In 1963, the Court attempted to provide “guideposts” as to what constitutes punishment in *Kennedy v. Mendoza-Martinez*. The Court has been extremely inconsistent in how it applies the *Mendoza-Martinez* factors. This inconsistency has resulted not only in confusion in the Court but has allowed the states to continue to push the envelope of what constitutes punishment. The *Kansas v. Hendricks* decision failed to recognize punishment as it has been considered, although not defined in earlier cases and was oblivious to how legal theorists and philosophers traditionally think about punishment. The net result is further confusion and greater latitude for the states in determining how they can punish criminals. The protections that are granted to the citizens of the United States under the Fifth Amendment have been further eroded as the distinction between civil and criminal proceedings exists in name only. It is no longer the police state that citizens must fear; rather, it is the administrative state.

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390. See e.g., Christi Parsons, *Jury Out on Sex-Offender Law: Long Sentences Expensive, Rehabilitation Doubtful*, CHICAGO TRIBUNE, June 28, 1998, at A1. Illinois has recently amended its Sexually Violent Persons Act to allow for indefinite involuntary civil commitment for defendants after they have served their prison sentences. See *id.* However, the Illinois law does provide for treatment. See *id.*